CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 **MARCH 15, 1995** **NO. 11**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 95–18)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR FEBRUARY 1995

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Monday, February 20, 1995.

Greece drachma:

February 1, 1995	$0.004208
February 2, 1995	.004218
February 3, 1995	.004198
February 4, 1995	.004198
February 5, 1995	.004198
February 6, 1995	.004180
February 7, 1995	.004164
February 8, 1995	.004176
February 9, 1995	.004184
February 10, 1995	.004193
February 11, 1995	.004193
February 12, 1995	.004193
February 13, 1995	.004195
February 14, 1995	.004210
February 15, 1995	.004214
February 16, 1995	.004264
February 17, 1995	.004268
February 18, 1995	.004268
February 19, 1995	.004268
February 20, 1995	.004268
February 21, 1995	.004289
February 22, 1995	.004296
February 23, 1995	.004301
February 24, 1995	.004298
February 25, 1995	.004298
February 26, 1995	.004298
February 27, 1995	.004303
February 28, 1995	.004305

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 1995 (continued):

South Korea won:

February 1, 1995	$0.001266
February 2, 1995	.001266
February 3, 1995	.001263
February 4, 1995	.001263
February 5, 1995	.001263
February 6, 1995	.001258
February 7, 1995	.001258
February 8, 1995	.001261
February 9, 1995	.001260
February 10, 1995	.001260
February 11, 1995	.001260
February 12, 1995	.001260
February 13, 1995	.001255
February 14, 1995	.001256
February 15, 1995	.001259
February 16, 1995	.001259
February 17, 1995	.001254
February 18, 1995	.001254
February 19, 1995	.001254
February 20, 1995	.001254
February 21, 1995	.001256
February 22, 1995	.001263
February 23, 1995	.001263
February 24, 1995	.001691
February 25, 1995	.001691
February 26, 1995	.001691
February 27, 1995	.001266
February 28, 1995	.001267

Taiwan N.T. dollar:

February 1, 1995	$0.038008
February 2, 1995	.038037
February 3, 1995	.038023
February 4, 1995	.038023
February 5, 1995	.038023
February 6, 1995	.038037
February 7, 1995	.038037
February 8, 1995	.038008
February 9, 1995	.038037
February 10, 1995	.037979
February 11, 1995	.037979
February 12, 1995	.037979
February 13, 1995	.037922
February 14, 1995	.037908
February 15, 1995	.037908
February 16, 1995	.037922
February 17, 1995	.037908
February 18, 1995	.037908
February 19, 1995	.037908
February 20, 1995	.037908
February 21, 1995	.037936
February 22, 1995	.037936
February 23, 1995	.037936
February 24, 1995	.037922

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 1995 (continued):

Taiwan N.T. dollar (continued):

February 25, 1995	$0.037922
February 26, 1995	.037922
February 27, 1995	.037965
February 28, 1995	.037936

Dated: March 1, 1995.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 95–19)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR FEBRUARY 1995

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 95–3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: Monday: February 20, 1995.

Austria schilling:

February 22, 1995	$0.096583
February 23, 1995	.096683
February 24, 1995	.096815
February 25, 1995	.096815
February 26, 1995	.096815
February 27, 1995	.097532
February 28, 1995	.097523

Belgium franc:

February 22, 1995	$0.032982
February 23, 1995	.033036
February 24, 1995	.033058
February 25, 1995	.033058
February 26, 1995	.033058
February 27, 1995	.033289
February 28, 1995	.034083

Denmark krone:

February 27, 1995	$0.172518
February 28, 1995	.172577

FOREIGN CURRENCIES—Variances from quarterly rates for February 1995 (continued):

Finland markka:

February 28, 1995	$0.221902

Germany mark:

February 21, 1995	$0.677277
February 22, 1995	.679810
February 23, 1995	.680504
February 24, 1995	.681477
February 25, 1995	.681477
February 26, 1995	.681477
February 27, 1995	.686483
February 28, 1995	.686483

Mexico peso:

February 15, 1995	$0.165837
February 16, 1995	.164204
February 17, 1995	.171821
February 18, 1995	.171821
February 19, 1995	.171821
February 20, 1995	.171821
February 22, 1995	.168634
February 24, 1995	.171233
February 25, 1995	.171233
February 26, 1995	.171233
February 27, 1995	.165017
February 28, 1995	.167504

Netherlands guilder:

February 22, 1995	$0.606171
February 23, 1995	.606759
February 24, 1995	.607607
February 25, 1995	.607607
February 26, 1995	.607607
February 27, 1995	.611883
February 28, 1995	.611958

Portugal escudo:

February 27, 1995	$0.006612
February 28, 1995	.006616

Switzerland franc:

February 27, 1995	$0.809192
February 28, 1995	.810898

Dated: March 1, 1995.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, March 1, 1995.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A MEN'S JACKET

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of a men's jacket. Notice of the proposed revocation was published January 18, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 3.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after May 15, 1995.

FOR FURTHER INFORMATION CONTACT: Suzanne Karateew, Textile Classification Branch, Office of Regulations and Rulings, (202) 482–7047.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 18, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 3, proposing to revoke Headquarters Ruling Letter (HRL) 956203 (5/20/94), concerning the tariff classification of a men's jacket. No comments were received from interested parties.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), (hereinafter section 625), this notice advises interested parties that Customs is revoking HRL 956205 to reflect proper classification of the men's jacket in subheading 6201.92.2051, HTSUSA, which provides for, *inter alia,* other men's cotton anoraks (including ski-jackets), windbreakers and similar articles. HRL 957382, revoking HRL 956205, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.910(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: February 23, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 23, 1995.

CLA–2 CO:R:C:T 957382 SK
Category: Classification
Tariff No. 6201.92.2051

ELEANORE KELLY-KOBAYASHI
RODE & QUALEY
295 Madison Avenue
New York, NY 10017

Re: Classification of a men's upper body garment; jacket v. shirt; 100% cotton flannel; full frontal heavy-duty zipper; back tabs; *Textile Category Guidelines,* CIE 13/88; 6201.92.2051; jacket is of sufficient warmth and coverage to warrant classification in heading 6201, HTSUSA.

DEAR MS. KELLY-KOBAYASHI:

On May 20, 1994, this office issued you, on behalf of your client, Shah Safari, Inc., Headquarters Ruling Letter 956205 in which Customs classified a men's flannel upper body garment under subheading 6211.32.0075, HTSUSA. Upon review, that determination is deemed to be in error. Our analysis follows.

Facts:

The garment at issue, identified as style number Y0383894, is a men's woven cotton flannel upper body garment. It has tong sleeves with cuffs, two diagonal pockets at the waist, and a hemmed straight bottom with back tabs. The garment features a hill frontal opening with a zipper closure. The teeth of the zipper, in their closed condition, measure approximately 6 mm in width. You submit that the fabric weight of the garment is 7.7 ounces per square yard.

Issue:

Whether the subject merchandise is properly classifiable as a men's jacket under heading 6201 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), or as a shirt-jacket under heading 6211, HTSUSA?

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of interpretation (GRI's), taken in order. GRI 1 provides that classification shall be according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot he classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

We concur with the analysis set forth in HRL 956205 in which this office determined that the subject garment, although possessing features traditionally associated with both jackets and shirts, nevertheless created the overall impression of a jacket. This determination rested primarily on the presence of a full frontal heavy-duty zipper, the teeth of which measured approximately 6 mm in width. We noted that full frontal zippers are relatively uncommon in shirts and the heavy gauge of the zipper served to create the impression of a jacket rather than a shirt.

Specifically at issue in this case is whether style number Y0383894 is classifiable as an anorak, wind-breaker or similar article of heading 6201, HTSUSA, or as a shirt-jacket of heading 6211, HTSUSA. The Explanatory Notes (EN) to heading 6101, which apply *mutatis mutandis* to the articles of heading 6201, HTSUSA, state:

> "[T]his heading covers * * * garments for men or boys, characterized by the fact that that they are generally worn over all other clothing for protection against the weather."

In HRL 956205, this office held that the subject garment's shirting fabric was not heavy enough to provide protection against the weather and therefore classification was precluded from heading 6201, HTSUSA. We disagree with our prior assessment. Customs has, in the past, classified many different types of lightweight jackets in heading 6201, HTUSUSA, *(i. e.,* silk bomber jackets and windbreakers). As the fabric used in the manufacture of style number Y0383894 is at least as heavy as the fabric used in the manufacture of many windbreakers and silk bomber jackets, and the design of the garment provides sufficient coverage so as to reasonably protect the wearer from the elements, this office is of the opinion that the subject merchandise is properly classifiable as a jacket of heading 6201, HTSUSA.

Holding:

HRL 956205 is revoked.

Style Y0383894 is classifiable under subheading 6201.92.2051, HTSUSA, which provides for, in pertinent part, "[A]noraks (including ski-jackets), windbreakers and similar articles (including padded sleeveless jackets): of cotton: other: other * * * other: other: men's," dutiable at a rate of 10 percent *ad valorem*. The applicable textile quota category is 334.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF A NYLON BAG SOLD WITH A BEACH BLANKET

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of a nylon bag sold with a beach blanket. Notice of the proposed revocation was published on January 18, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 3.

EFFECTIVE DATE: Merchandise enter or withdrawn from warehouse for consumption on or after May 15, 1995.

FOR FURTHER INFORMATION CONTACT: Carlos Halasz, Textile Classification Branch, Office of Regulations and Rulings, (202) 482–7059.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 18, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 3, proposing to modify New York Ruling Letter (NYRL) 882874, issued March 8, 1993, wherein a nylon bag and a beach blanket were classified together in subheading 6307.90.9986, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other textile articles not more specifically described elsewhere in the tariff schedule. Two comments were received in response to the notice. The commentators claimed that the nylon bag is specifically designed to accommodate the beach blanket and should be classified together, pursuant to General Rule of Interpretation 5(a), HTSUS. Accordingly, they reason that NYRL 882874 should not be modified.

After careful review of the points raised by the commentators, we find that the nylon bag does not meet the criteria set forth in General Rule of Interpretation 5(a) and should be classified separately. Therefore, the bag is properly classifiable as a travel bag of subheading 4202.92.3030, HTSUS.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NYRL 882874 to reflect the proper classification of the nylon bag as a travel bag of subheading 4202.92.3030, HTSUS. Headquarters Ruling Letter (HRL) 957116, modifying NYRL 8828747 is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 ark 177.10(c)(1)).

Dated: February 23, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 23, 1995.

CLA–2 CO:R:C:T 957116 ch
Category: Classification
Tariff No. 4202.92.3030 and 6307.90.9989

JOHN A. SLAGLE
DIRECTOR, CUSTOMS LAWS & REGULATIONS
WOLF D. BARTH & CO., INC.
7575 Holstein Avenue
Philadelphia, PA 19153

Re: Modification of NYRL 882874; tariff classification of a nylon bag for a beach blanket; GRI 5(a); of a kind normally sold therewith; GRI 3(b); composite goods.

DEAR MR. SLAGLE:

In New York Ruling Letter (NYRL) 882874, dated March 8, 1993, you were advised that a beach blanket and a nylon bag were classified together in subheading 6307.90.9986, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other made up textile articles. We have had occasion to review NYRL 882874 and find that the classification of the nylon bag was in error.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 882874 was published on January 18, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 3. Two comments were filed in response to the notice.

Facts:

The submitted sample is described as a "Beach Blanket." The article measures approximately 80 inches by 44 inches and features a surface layer of 100 percent cotton terry cloth; and a bottom layer of 100 percent cotton twill fabric. A round patch with hook and loop fasteners has been sewn onto each comer, so that individual blankets may be attached to one another. The corners are waterproof and contain galvanized steel disks. The item features a pocket, secured by hook and loop fasteners, which contains a plastic inflatable pillow.

An accompanying nylon bag may be used to hold the "Beach Blanket." It measures approximately 24 inches in length by 15 inches in width and is composed of woven nylon. The bag features a drawstring closure, plastic hardware and a polypropylene handle and shoulder strap. A pocket secured by hook and loop fasteners, and measuring approximately 9 inches by 7½ inches, has been sewn to the front of the bag.

Accompanying marketing materials describe the bag as a "Back-pack Tote Bag—constructed of heavy duty waterproof nylon." In addition, a hangtag affixed to the bag states:

> IT'S IN THE BAG!
> The original Rolle Bag makes carrying the blanket and other beach supplies a breeze. Features multiple position strap (converts to back pack, fanny bag, shoulder bag, etc.), interior key hook, wet/dry pocket and more.

Issue:

What is the proper tariff classification for the carrying bag?

Law and Analysis:

In NYRL 882874, the "Beach Blanket" was classified in heading 6307, HTSUS, which provides for other made up textile articles. The bag was classified in the same heading on the basis of General Rule of Interpretation (GRI) 5(a), which provides that:

> Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and entered with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character.

We concluded that the nylon bag met the requirements of GRI 5(a). Accordingly, the bag was classified with the blanket.

The Explanatory Note (EN) to GRI 5(a) provides that:

> (l) This Rule shall be taken to cover only those containers which:
>
> **(1) are specially shaped or fitted to contain a specific article or set of articles, i.e., they are designed specifically to accommodate the article for which they are intended. Some containers are shaped in the form of the article which they contain;**
>
> (2) are suitable for long-term use, i.e., they are designed to have a durability comparable to that of the articles for which they are intended. These containers also serve to protect the article when not in use (during transport or storage, for example). These criteria enable them to be distinguished from simple packings;
>
> (3) are presented with the articles for which they are intended, whether or not the articles are packed separately for convenience of transport. Presented separately the containers are classified in their appropriate headings;
>
> **(4) are of a kind normally sold with such articles; and**
>
> (5) do not give the whole its essential character.
>
> (Emphasis added).

In order for the nylon bag to be classified with the blanket, it must meet the criteria set forth above. The criteria limit the scope of GRI 5(a) to containers which would normally be discarded or have no use without their contents.

In NYRL 882874, we erroneously concluded that the bag was classifiable with the blanket pursuant to GRI 5(a). The bag does not possess internal fittings, nor is it shaped to the form of its contents. Consequently, it is susceptible to uses other than to hold the beach blanket. In this regard, we note that the bag resembles a duffel bag and is marketed for use as a back pack, fanny bag or shoulder bag. Similar bags are the subject of trade in the United States when sold separately and are marketed as general purpose carrying bags. Thus, the bag is desirable in and of itself and may be used without the blanket. Evidence that the instant item may be used in this fashion includes the fact that it is advertised as a container for "carrying the blanket and other beach supplies." The alternative use of the article as a general purpose travel bag may induce the consumer to purchase its contents and will enhance the value of the merchandise as a whole. For these reasons, the bag is not "of a kind normally sold with" its contents and cannot be classified with the beach blanket.

You have submitted a copy of the U.S. Patent awarded to the beach blanket, which indicates that the blanket will be used in conjunction with a carrying bag incorporating preferred physical attributes. Preferred specifications for the bag include a drawstring closure, waterproof material, carry strap, and a pocket secured by means of hook and loop fasteners. In addition, the bag must be of a size suitable for holding the blanket in its folded position. Byway of analogy, the extraneous carrying capacity of the bag has been equated with additional room in a gun case for ammunition; or an additional compartment in a gui-

tar case for strings. In light of these considerations, you contend that the bag has been designed to specifically accommodate its contents and should be classified with the blanket.

While we agree that the bag is suitable for use with the blanket, we reiterate that it resembles duffel or travel bags which are the subject of trade as general purpose carrying containers. The preferred physical characteristics for the bag are relatively generic and are not so restrictive that the bag is limited for use with the blanket. The bag is just as suitable for carrying or storing clothing and other personal effects as it is for transporting and protecting the beach blanket. On the other hand, musical instrument or gun cases shaped to the form of their contents would be unsuitable for use as travel or tote bags[4] despite the presence of compartments for ammunition or strings. Hence, they would be discarded without their contents or would be sold solely for use with a particular article such as a gun or a guitar. Consequently, for the purposes of this discussion, the gun and musical instrument cases are designed to specifically accommodate their contents. However, the bag for the blanket does not meet this description.

GRI 3(b) states:

> Mixtures, **composite goods consisting of** different materials or made up of **different components,** which cannot be classified by reference to 3(a), **shall be classified as if they consisted of the material or component which gives them their essential character** (emphasis added).

On occasion, we have determined that a carrying bag and its contents may be classified as composite good, with the essential character imparted by the contents. *See* Headquarters Ruling Letter (HRL) 955787, dated April 26, 1994 (carrying bag classified with boxer shorts); HRL 087280, dated July 16, 1990 (carrying bag classified with ponchos); HRL 086343, dated July 13, 1990 (carrying bag classified with windbreaker); HRL 086344, dated July 5, 1990 (carrying bag classified with coveralls). Thus, GRI 3(b) provides an alternative basis by which a carrying bag may be classified with its contents.

The EN to GRI 3(b) provides in pertinent part that:

> For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole **but also those with separable components, provided these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts** (emphasis added).

In this instance, the nylon bag is in the nature of a tote, duffel or shoulder bag for carrying various personal effects. It is of a durable construction and, as discussed above, would normally be sold as an independent product in its own right. Consequently, in this instance the carrying bag and the blanket do not comprise a composite article.

As the nylon bag cannot be classified with the blanket, it must be classified under the heading which most specifically describes it. Therefore, it is classifiable in heading 4202, HTSUS, which provides in pertinent part for travel, sports and similar bags.

Holding:

NYRL 882874 is hereby modified. The "Beach Blanket" is classifiable in subheading 6307.90.9989, HTSUS, which provides for other made up textile articles. The applicable rate of duty is 7 percent *ad valorem*.

The nylon bag is classifiable in subheading 4202.92.3030, HTSUS, which provides for travel, sports and similar bags, with outer surface of textile materials: other, other: of man-made fibers: other. The applicable rate of duty is 19.8 percent *ad valorem*. The textile category is 670.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are the subject of frequent negotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importing the merchandise to determine the status of any import restraints or requirements.

In accordance with section 625, this ruling will become effective 50 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decision pursuant to section 625 does not constitute a change of practice of position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SILK-KNIT GARMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of certain silk-knit garments. Notice of the proposed modification was published January 18, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 3.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 15, 1995.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Classification Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 18, 1995, Customs published in the CUSTOMS BULLETIN, Volume 29, Number 3, proposing to modify District Decision (DD) 868592, dated December 3, 1991, concerning the tariff classification of certain silk-knit garments. One comment was received from an interested party.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying DD 868592 to reflect proper classification of the silk knit garments in subheading 6109.90.2020, HTSUSA, if imported as women's garments, and subheading 6109.90.2010, HTSUSA, if imported as men's garments. HQ 957132 revoking DD 868592, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: February 28, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 28, 1995.

CLA–2 CO:R:C:T 957132 jb
Category: Classification
Tariff No. 6109.90.4020 and 6109.90.4010

ALAN R. KLESTADT, ESQ
SUZANNE B. BARNETT, ESQ.
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN
245 Park Avenue, 33rd Floor
New York, NY 10167

Re: Modification of DD 868592; tariff classification of a woman's silk knit garment; heading 6109, HTSUSA, provides not only for T-shirts, but also for singlets, tank tops and similar garments.

DEAR MR. KLESTADT AND MS. BARNETT:

On December 3, 1991, our New York office issued to you, on behalf of your client Terramar Sports, District Decision Letter 868592, which held that a silk knit garment featuring, a drawstring waist was classifiable as a pullover garment in heading 6110, HTSUSA. This office has had occasion to review that ruling and has determined that it is in error.

Facts:

The merchandise in question, style 91–3023–5, is a woman's 100 percent silk knit pullover; featuring a drawstring waist, long sleeves and ribbed sleeve cuffs and neckline. DD 868592 classified the garment as a pullover in subheading 6110.90.0082, HTSUSA.

Issue:

Whether the presence of a drawstring waist precludes the instant garment from classification in heading 6109, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that classification be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied, taken in order.

Heading 6109, HTSUSA, provides for T-shirts, singlets, tank tops and similar garments, knitted or crocheted. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System constitute the official interpretation of the scope and content of the tariff at the international level. The EN to heading 6109, HTSUSA, state:

> The term "T-shirts" means lightweight knitted or crocheted garments of the vest type, of cotton or man-made fibre, not napped, nor of pile or terry fabric, in one or more

colours, with or without pockets, with long or short close-fitting sleeves, without buttons or other fastenings, without collar, without opening in the neckline, having a close-fitting or lower neckline (round, square, boat-shaped or V-shaped). These garments may have decoration, other than lace, in the form of advertising, pictures or an inscription in words, obtained by printing, knitting or other process. The bottom of these garments, usually hemmed, is never made with a ribbed waistband, drawstring or other means of tightening.

This heading also includes **singlets** and **other vests.** (Emphasis added).

"Singlet" is defined as:

> an athletic jersey; undershirt. *Webster's Ninth New Collegiate Dictionary* at 1100, (1983)

"Vest" is defined as:

> a man's sleeveless undershirt; a knitted undershirt for women. *Webster's Ninth New Collegiate Dictionary* at 1312, (1983)

One comment was received in opposition to the modification of DD 868592. That comment stated that the classification of the silk knit garment in heading 6109, HTSUSA, is due to an erroneous interpretation of the Explanatory Notes to heading 6109, HTSUSA, and that the term "T-shirt" refers to both an outerwear and underwear garment. Support for this position is stated to he the language of the EN defining "T-shirts" as garments of the "vest type", the latter expression being a term more commonly used in the British vernacular, finding its parallel in the word "underwear" in the United States. This being so, i.e., the subject garment being an underwear garment, it is within the parameters of T-shins of the vest type and therefore, the drawstring prohibition is applicable to the undergarments in issue. As the garment is precluded from classification in heading 6109, HTSUSA, by virtue of the drawstring, it is properly classifiable in heading 6110, HTSUSA.

It should be clear that the EN to heading 6109, HTSUSA; not only provide for T-shirts, of the outerwear and underwear type, but **in addition to and separate from T-shirts,** the heading provides for **singlets and vests**. As such, as per their definitions, "singlet" and "vest" are **underwear-type** shirts and are consequently *prima facie* provided for at the international level in heading 6109, HTSUSA. Customs has ruled on virtually identical merchandise on numerous times and has determined that these underwear type garments are provided for in heading 6109, HTSUSA *(See* HQ 951315, dated April 9, 1993 and HQ 951074, dated April 24,1992).

The subject garment which has a bottom drawstring, is not intended as what is commercially recognized as a T-shirt. It is on the other hand, the class or kind of merchandise that is commonly and commercially known in the United States as long underwear. Furthermore, based on a copy of Terramar's 1992 Fall/Winter catalog, the basis of the firm's business is underwear and the catalog deafly promotes the merchandise as such:

> **THE TERRAMAR STORY:**
>
> Over 12 years ago, Terramar was the first company to develop and introduce silk knitted underwear to America and since that time our THERMASILK underwear has enjoyed a worldwide reputation as the leading brand * * *
>
> Introduced in 1989, the new TRANSPORT underwear is now considered one of the most comfortable, and most technically advanced high performance underwear available * * *
>
> To match its state-of-the-art product technology, Terramar has also developed some new and exciting merchandising aids including new product packaging and professionally designed floor racks all designed to help you see more Terramar underwear.

The subject silk knit garment fits squarely within the express terms of the heading and the EN to heading 6109, HTSUSA. The subject garment is not a T-shirt, per se, but it is a singlet or vest, or what is commonly referred to as an **underwear type** garment. Thus, based upon the garment, earlier Customs rulings, and the garment's recognition commonly and commercially as underwear, the subject garment is classifiable as a similar garment, i.e., undershirt, in heading 6109, HTSUSA.

Holding:

The subject garment, referenced style number 91–3023–5, is classifiable in subheading 6109.90.4020, HTSUSA, which provides for, *inter alia,* singlets, tank tops and similar garments, knitted or crocheted, of other textile materials, other, women's or girls': containing

70 percent or more by weight of silk or silk waste. The applicable rate of duty is 15.6 percent *ad valorem* and the textile quota category is 739.

When imported as a men's garment, it is classifiable in subheading 6109.90.4010, HTSUSA, which provides for, *inter alia*, singlets, tank tops and similar garments, knitted or crocheted, of other textile materials, other, men's or boys': containing 70 percent or more by weight of silk or silk waste. The applicable rate of duty is 15.6 percent *ad valorem* and the textile quota category is 738.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF A TEXTILE DRAWSTRING BAG

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a textile drawstring bag. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before April 14, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., Franklin Court, Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Carlos Halasz, Textile Classification Branch, (202) 482–7059.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a textile drawstring bag.

In New York Ruling Letter (NYRL) 804280, dated November 21, 1994, a textile drawstring bag designed for use as a gift wrap for a liquor bottle was classified in subheading 4202.92.3030, Harmonized Tariff Schedule of the United States (HTSUS), which provides for travel, sports and similar bags of man-made fibers. This ruling letter is set forth in Attachment A to this document.

However, Customs has concluded that the classification of the drawstring bag in subheading 4202.92.3030, HTSUS, is in error. Based upon its physical characteristics and its intended use, Customs is of the opinion that the bag is properly classifiable in subheading 6307.90.9989, HTSUS, which is the residual provision for articles of textiles. Customs intends to revoke NYRL 804280 to reflect the proper classification of the merchandise in subheading 6307.90.9989, HTSUS.

Before taking this action, consideration will be given to any written comments timely received. The proposed ruling revoking NYRL 804280 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: February 24, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 21, 1994.

CLA–2–42:S:N:N6:341 804280
Category: Classification
Tariff No. 4202.92.3030

MR. PETER G. SELLEY
TREEMORE INDUSTRIES
115 Healey Road
Bolton, ON L7E 5R3

Re: The tariff classification of a drawstring bag from Canada.

DEAR MR. SELLEY:

In your letter dated November 2, 1994, you requested a tariff classification ruling for a drawstring bag.

You have submitted a sample of a drawstring bag designed to contain a liquor bottle. The item appears to be composed of a man-made textile woven fabric. It is unlined and measures approximately 6½ inches in width by 18 inches in length.

The applicable subheading for the drawstring bag of man-made textile woven fabric will be 4202.92.3030, Harmonized Tariff Schedule of the United States (HTS), which provides for travel, sports and similar bags, with outer surface of textile materials, other, of man-made fibers, other. The rate of duty will be 20 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents tiled at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:T 957464 ch
Category: Classification
Tariff No. 6307.90.9989

PETER G. SELLEY
TREEMORE INDUSTRIES, INC.
115 Healey Road
Bolton, ON L7E 5R3

Re: Revocation of NYRL 804280; tariff classification of a drawstring bag; gift bag.

DEAR MR. SELLEY:

This is in response to your letter, dated December 14, 1994, requesting reconsideratIon of New York Ruling Letter (NYRL) 804280, dated November 21, 1994. In that decision, we classified a textile drawstring bag in subheading 4202.92.3030, Harmonized Tariff Schedule of the United States (HTSUS), which provides for travel, sports and similar bags of man-made fibers.

Facts:

The submitted sample is a cotton drawstring bag measuring approximately 15½ inches by 6½ inches. You state that the bag is marketed as an alternative to paper gift wrapping for liquor bottles. In NYRL 804280, the bag was classified in subheading 4202.92.3030, HTSUS, which provides for travel, sports and similar bags of man-made fibers.

Issue:

What is the proper tariff classification for the cotton drawstring bag?

Law and Analysis:

Heading 4202, HTSUS, provides for:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

Thus, the heading encompasses the enumerated containers and containers similar thereto. In *Totes, Incorporated v. United States,* Slip Opinion 94–154, the Court of International Trade held that "the essential characteristics and purpose of the Heading 4202 exemplars are * * * to organize, store, protect and carry various items."

Heading 6307, HTSUS, provides for other textile articles not more specifically described elsewhere in the tariff schedule. The Explanatory Note (EN) to heading 6307, at page 867, states in pertinent part that the provision **includes:**

> (5) Domestic laundry or shoe bags, stocking, handkerchief or slipper sachets, pajama or nightdress cases and similar articles.
> (6) Garment bags (portable wardrobes) other than those of heading 42.02.

In addition, the EN to heading 6307, at page 868, states that the heading excludes "travel goods (suitcases, rucksacks, etc.), shopping-bags, toilet-cases, etc., and all similar containers of heading 42.02." It should be noted that articles such as laundry or shoe bags may take the form of a drawstring bag or pouch.

The foregoing indicates that travel containers of heading 4202, HTSUS, are excluded from heading 6307. Moreover, the exemplars cited as examples of bags classifiable within heading 6307 suggest that certain storage bags are excluded from heading 4202. In practice, the distinction between travel and storage bags is often difficult to apply. For example, garment bags, shoe bags and similar bags may be principally used for either storage or travel depending upon their construction or design. Furthermore, heading 4202 is not limited to containers used for travel purposes. For example, jewelry boxes are classifiable under heading 4202 despite the fact that they are principally used to store and/or display their contents. Other containers of heading 4202, including cutlery cases, cigarette cases and similar cases, may principally be used for storage purposes, depending upon their construction.

In marginal circumstances, we regard the substantiality of the container as a pertinent consideration. Substantial containers are more likely to be used for carrying purposes and are better able to protect their contents. The term "substantial" in this context refers not only to the material composition of the article, but also to whether It has been designed for repetitive use. Thus, lined jewelry pouches constructed of quality materials have been classified in heading 4202 as they were suitable for use during travel. *See* Headquarters Ruling Letter (HRL) 950000, dated October 31,1991.

In addition, the Explanatory Note to heading 4202 excludes certain containers which are not specially shaped or fitted. For example, jewelry boxes of a kind sold at retail with their contents are classified in the heading only if they are specially shaped or fitted to hold their contents and suitable for long-term use. We regard this requirement as a relevant consideration when classifying merchandise at the periphery of the heading. Containers which are specially shaped or fitted are better suited for organizing and storing merchandise. Thus, jewelry pouches have been excluded from heading 4202 when of an insubstantial nature and not fitted to hold jewelry. *See* HRL 953176, dated March 16, 1993.

In this instance, the bag is insubstantial in the sense that it is not designed for travel or to store or protect its contents. While the bag is capable of re-use, it is designed principally as an alternative for gift wrapping and functions as an attractive means for presenting its contents. Moreover, while the pouch is of a size suitable. for wrapping a liquor bottle and will be used for this purpose, it is not regarded as specially shaped or fitted. The bag does not feature internal fittings to accommodate a bottle. In addition, it is not shaped to the form of its contents and is capable of holding bottles of various dImensions, as well as any number of smaller items. In HRL 956234, dated November 14,1994, we classified similar merchandise in heading 6307, HTSUS. Therefore, based on the foregoing, we conclude that the drawstring bag is excluded from heading 4202, HTSUS, and is properly classified in heading 6307, HTSUS.

Holding:

NYRL 804280 is hereby revoked. The subject merchandise is classifiable under subheading 6307.90.9989, HTSUS, which provides for other made up articles, including dress patterns; other: other: other, other: other. The applicable rate of duty is 7 percent *ad valorem*.

JOHN DURANT,
Director,
Commercial Rulings Division.

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING AUTO/MARINE ADAPTERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that Customs has issued a final determination concerning the country of origin of certain auto/marine adapters which are being offered to the U.S. Federal Bureau of Investigation ("FBI") in a procurement designated under FBI Solicitation No. 6178. The final determination found that based upon the facts presented, the country of origin of auto/marine adapters is the U.S. (Scenario I) and the Netherlands (Scenario II).

DATES: The final determination was issued on February 23, 1995. Any party-at-interest, as defined at 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of March 2, 1995.

ADDRESSES: Copies of the nonconfidential portions of this final determination may be obtained by writing or calling the Legal Reference Staff, Office of Regulations And Rulings, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, N.W., Washington, DC 20229; (202) 482–6906.

FOR FURTHER INFORMATION CONTACT: Anthony A. Tonucci, Attorney-Advisor, Office of Regulations and Rulings, (202) 482–7073.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on February 23, 1995, pursuant to Subpart B of Part 177, Customs Regulations (19 CFR Part 177, Subpart B), Customs issued a final determination concerning the country of origin of certain auto/marine adapters which are being offered to the FBI in a procurement designated under FBI Solicitation No. 6178. The U.S. Customs ruling number is HQ 735346. This final determination was issued at the request of one of the offerors under procedures set forth at 19 CFR 177 subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). The final determination concluded that based upon the facts presented: (1) Taiwanese DC to DC converters are substantially transformed in the U.S. (Scenario I) and the Netherlands (Scenario II) as a result of being further processed and assembled with other components into auto/marine adapters; (2) Taiwanese DC to DC converters and the other components which are of U.S. origin also are substantially transformed in the Netherlands as a result of being further processed and assembled into auto/marine adapters. Accordingly, the country of origin of the auto/marine adapters is the U.S. (Scenario I) and the Netherlands (Scenario II).

This document gives notice pursuant to section 177.29, Customs Regulations, (19 CFR 177.29), of that final determination. Any party-at-interest, as defined at 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of March 2, 1995.

Dated: February 23, 1995.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, March 2, 1995 (60 FR 11697)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–26)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Court No. 92–03–00162

(Dated February 24, 1995)

JUDGMENT

TSOUCALAS, *Judge:* This Court, having received and reviewed the Department of Commerce, International Trade Administration's Results of Redetermination Pursuant to Court Remand, *Timken Co. v. United States,* Slip Op. 94–150 (Sept. 23, 1994) ("Remand Results"), and any comments to the Remand Results submitted by the parties, it is hereby

ORDERED that the Remand Results filed by the Department of Commerce, International Trade Administration, are affirmed; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

[NOTE: This order entered as a Stipulated Judgment on December 30, 1993 is now being entered as Slip Op. 95-27, February 24, 1995.]

(Slip Op. 95-27)

ENRON OIL TRADING & TRANSPORTATION CO., F/K/A UPG FALCO, A DIVISION OF UPG, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Civil Action No. 87-09-00934

(Dated February 24, 1995)

STIPULATION FOR JUDGMENT

This action, as prescribed by Rule 58.1 of the Rules of the United States Court of International Trade, is stipulated for judgment, pursuant to a settlement and compromise, on the following agreed statement of facts in which the parties agree that:

1. The protest involved here was filed and the action involved here was commenced within the time provided by law, and all liquidated duties, charges or exactions have been paid prior to the filing of the summons.

2. The subject dispute between the parties relates to the liquidation by defendant of certain petroleum entries, set forth in Schedule A, at a higher rate of duty than that claimed by the plaintiff to be correct.

3. The parties, by means of this Stipulated Judgment, agree to settle their dispute, without liquidating the underlying entries, by the defendant making a lump-sum payment to plaintiff of three hundred fourteen thousand eight hundred ninety-five dollars and zero cents ($314,895.00) (which includes the sum of twenty-seven thousand two hundred sixty-three dollars and zero cents [$27,263.00], the proportionate refund of the interest paid for late payment of increased duties), plus interest pursuant to 19 U.S.C. § 1520(d), at the applicable statutory rate established under 26 U.S.C. §§ 6621 and 6622, from September 3, 1987, the date of payment of the increased duties plus interest, to September 11, 1987, the date of filing of the summons herein, plus interest pursuant to 19 U.S.C. § 2644, at the applicable statutory rate established under 26 U.S.C. §§ 6621 and 6622, from September 11, 1987 to the date of the refund of the stipulated principal amount.

4. The payment shall be made by means of a United States Treasury check made payable to "EOTT Energy Corp." addressed and mailed to the office of the undersigned counsel for plaintiff.

5. The only refund and interest payable by reason of this judgment are those specified in paragraph 3 above.

6. All other claims are abandoned.

7. Each of the parties shall bear its own attorneys' fees, costs and expenses.

Respectfully Submitted,

HERBERT PETER LARSEN,
Attorney for Plaintiff.

JOSEPH I. LIEBMAN,
Attorney in Charge,
International Trade Field Office.

BRUCE N. STRATVERT,
Civil Division, Department of Justice,
Commercial Litigation Branch,
Attorneys for Defendant.

IT IS HEREBY ORDERED that this action is decided and this final judgment is to be entered by the Clerk of this Court; the appropriate Customs Service officials shall make refund with interest, as specified in paragraphs 3 and 4 above, in accordance with the stipulation of the parties set forth above.

Dated: December 30, 1993.

R. KENTON MUSGRAVE,
Judge.

(Slip Op. 95–28)

B-WEST IMPORTS, INC., HING LONG TRADING CO., K-SPORTS IMPORTS, INC., EAGLE EXIM, INC., BRIKLEE TRADING CO., CENTURY ARMS, INC., INTRAC CORP., NORTHWEST IMPORTS, J'S PACIFIC ENTERPRISE, INC., AND SPORTSARMS OF FLORIDA, PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 94–06–00371

[Plaintiffs' motion for summary judgment denied. Defendants' motion for summary judgment granted.]

(Dated February 24, 1995)

O'Connor & Hannan (Donald R. Dinan, William W. Nickerson and *Craig A. Koenigs)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeffrey M. Telep), Bradley A. Buckles, Imelda Koett* and *Teresa Ficaretta,* Bureau of Alcohol, Tobacco & Firearms, United States Department of Treasury, of counsel, *Orde Kittrie,* Attorney Advisor, Office of the Legal Advisor, United States Department of State, of counsel, *Ellen McClain,* Office of Chief Counsel, United States Customs Service, of counsel, for defendants.

OPINION

RESTANI, *Judge:* This action is before the court on cross-motions for summary judgment made pursuant to USCIT Rule 56 by defendants

United States, et al., and plaintiffs B-West Imports, Inc., Hing Long Trading Co., K-Sports Imports, Inc., Eagle Exim, Inc., Briklee Trading Co., Century Arms, Inc., Intrac Corporation, Northwest Imports, J's Pacific Enterprise, Inc. and Sportsarms of Florida. Plaintiffs, importers of munitions, challenge the decision of the Bureau of Alcohol, Tobacco & Firearms ("ATF") of the United States Department of the Treasury banning the importation of defense articles[1] from the People's Republic of China ("China") instituted under section 2778 of the Arms Export Control Act ("AECA"). 22 U.S.C § 2778 (1988).

FACTS

On May 26, 1994, President Clinton announced the renewal by the United States of Most Favored Nation trading status to China. In light of "continuing human rights abuses," however, the President declared a ban on the "import of munitions, principally guns and ammunition from China." Following the President's announcement, Secretary of State Warren Christopher issued a letter to Secretary of Treasury Lloyd M. Bentsen, advising him of the termination of China's exemption from the list of proscribed countries from which defense articles may not be imported. The letter further advised the Treasury Department to "take all necessary steps to prohibit the import of all defense articles enumerated in the U.S. Munitions List." As authority for this action, Secretary Christopher cited section 38 of the AECA, codified at 22 U.S.C § 2778, and Executive Order No. 11,958, 42 Fed. Reg. 4311 (1977), *reprinted as amended in* 22 U.S.C. § 2751 note (1988) (Ex. Ord. No. 11,958. Administration of Chapter).

The United States Customs Service ("Customs") responded with an administrative notice dated May 27, 1994, ordering all "tariff commodities from China" to be detained until further notice. On May 31, 1994, Customs limited the detention to all shipments of "Chapter 93 tariff commodities[2] exported from China regardless of the country of origin." This was followed by a more detailed administrative notice on June 7, 1994, indicating that, as of May 28, 1994, 12:01 a.m. EDT, all articles from China on the U.S. Munitions List were prohibited from importation. Additionally, any current permits to import such articles from China were declared null and void. Defense articles imported into the United States prior to the embargo were also banned from importation if no entry had been filed with Customs, or if the articles were imported

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[1] The statute defines "defense article" as:

(A) any weapon, weapons system, munition, aircraft, vessel, boat, or other implement of war,

(B) any property, installation, commodity, material, equipment, supply, or goods used for the purposes of making military sales,

(C) any machinery, facility, tool, material, supply, or other item necessary for the manufacture, production, processing, repair, servicing, storage, construction, transportation, operation, or use of any article listed in this paragraph, and

(D) any component or part of any article listed in this paragraph * * *.

22 U.S.C. § 2794(3) (1988). Defense articles are also defined as "the items on the United States Munitions List pursuant to [22 U.S.C. § 2778]." 50 U.S.C. § 415(b)(2) (1988). There is no dispute that the articles at issue are defense articles and are also on the U.S. Munitions List.

[2] Chapter 93 of the Harmonized Tariff Schedule of the United States ("HTSUS") covers arms and ammunition, and parts and accessories thereof, such as military weapons, machine guns, revolvers, and pistols, other firearms and similar devices which operate by the firing of an explosive charge, bombs, grenades, torpedoes, missiles and similar munitions of war, and swords, lances, bayonets and similar arms. HTSUS, USITC Pub. 2690, sec. XIX, ch. 93 (Supp. 1 1994).

into a bonded warehouse or foreign trade zone. These articles, however, were permitted exportation back to China or the country of origin without State Department approval if returned prior to June 30, 1994. The following day, Customs issued a revised notice adding that exceptions to the embargo could be made on a case-by-case basis if a request was submitted to Customs Headquarters.[3]

On June 27, 1994, the ATF issued notices to affected importers advising them of the import ban and the revocation of their existing import permits. The notice informed importers that requests may be made within 30 days of receipt of the letter "for an opportunity to present additional information and to have a full review of [their] case by the [ATF]." Further, importers seeking an exception to the import ban were required to file new permit applications along with "an explanation of why the importation [was] in accordance with the security and foreign policy of the United States." These applications would be referred to the State Department for consideration.

Customs issued a notice dated August 5, 1994, clarifying which defense articles were subject to import restrictions under the embargo. The notice provided that those articles entered into the geographical territory of the United States[4] on or after May 28, 1994 were subject to the import ban. Thus, defense articles within United States territory prior to that date, whether in foreign trade zones, a Customs bonded warehouse, or on a dock unentered, were not subject to import restrictions. These articles would be permitted entry, provided the importers obtained new import permits from the ATF.

The notice further provided that imported articles subject to the embargo could either be (1) returned to China or the country of origin by August 31, 1994 without State Department approval, (2) retained in a bonded warehouse until an export license was obtained if not exported prior to August 31, 1994, or (3) destroyed under Customs' supervision. The ATF issued a subsequent letter dated August 10, 1994 informing affected importers of Customs' notice and specifying the documentation to be submitted with new permit applications by importers seeking a foreign policy exception from the State Department.

Congress incorporated the terms of the embargo into the Act of Aug. 26, 1994, Pub. L. No. 103–317, § 609, 108 Stat. 1724, 1774 (1994) ("Craig Amendment"), creating an additional exception. The Craig Amendment provided relief from the import ban to those importers who possessed valid import permits before May 26, 1994, and whose products had either been "in a bonded warehouse or foreign trade zone, in port, or, as determined by the United States on a case-by-case basis, in transit."[5] In letters issued September 6, 1994, the ATF specified the applica-

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[3] Defendants have indicated that Customs is not processing applications for exception from the import ban.

[4] As defined in the August 5th Customs notice, "geographical territory" was "the port limits of the particular U.S. port at which the merchandise arrived and includes merchandise in a foreign trade zone or a Customs bonded warehouse."

[5] The ATF interpreted "in transit" to include articles that left port in China consigned to a U.S. importer on or before May 26, 1994. Plaintiffs challenge to the ATF's interpretation of "in transit" was not raised in their complaint and thus is not at issue in this action.

tion procedures for those importers seeking relief under this additional exception.

Plaintiffs allege that (1) the AECA does not authorize the President and the administering agencies to impose an import embargo, (2) the acts by Customs and the ATF invalidating and revoking existing import licenses were *ultra vires,* and (3) the implementation of the embargo, with respect to "in transit" goods was arbitrary, capricious and contrary to the stated objectives of the embargo. Plaintiffs also raise constitutional claims contending the embargo violated the Due Process Clause and Takings Clause of the Fifth Amendment. Defendants oppose these contentions, additionally alleging that plaintiffs have failed to exhaust their administrative remedies.

STANDARD OF REVIEW

Summary judgment is appropriately granted where the pleadings and affidavits show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. USCIT Rule 56(d); *e.g., Pfaff Am. Sales Corp. v. United States,* 16 CIT 1073, 1075 (1992).

DISCUSSION

I. *Exhaustion of Administrative Remedies:*

Defendants have submitted documents indicating that some or all of the plaintiffs have filed applications seeking relief from the import ban. According to defendants, the avenues of relief available to affected importers were (1) an exception granted under the Craig Amendment, (2) a foreign policy exception granted by the State Department, and (3) full review of their case by the ATF. To date, all of the plaintiffs[6] have applied for relief under these various administrative proceedings and, although some have been granted relief for their products, many plaintiffs still have applications pending. Thus, defendants ask the court to dismiss plaintiffs' complaint for failure to exhaust its administrative remedies. The court declines to do so.

Congress has directed that this court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (1988); *see, e.g., Encon Indus., Inc. v. United States,* Slip Op. 94–145, at 3 (Sept. 19, 1994); *Borusan Holding A.S. v. United States,* 16 CIT 278, 284 (1992). Unless exhaustion of administrative remedies, however, is mandated by statute, it is within the discretion of the court to apply the exhaustion doctrine. *Ceramica Regiomontana, S.A. v. United States,* 16 CIT 358, 359 (1992); *Timken Co. v. United States,* 10 CIT 86, 92–93, 630 F. Supp. 1327, 1334 (1986). Thus, the court need not require exhaustion in "exceptional cases or particular circumstances * * * where injustice might otherwise result," *see Rhone Poulenc, S.A. v. United States,* 7 CIT 133, 134–35, 583 F. Supp. 607, 609–10 (1984) (quoting *Hormel v. Helvering,* 312 U.S. 552, 557 (1941)), nor should exhaustion operate to prevent a reasonable opportunity to object to significant agency action.

[6] As J's Pacific Enterprise, Inc. was added as a plaintiff after oral argument, it is unclear whether they have sought relief under any of the remedies noted above.

See American Maritime Ass'n v. United States, 766 F.2d 545, 566 n.30 (D.C. Cir. 1985).

In the present case, plaintiffs are challenging a significant agency action, the import embargo, where the administrative remedies proffered to plaintiffs were not clearly delineated by the administering agencies. The bases upon which plaintiffs were to submit requests for a full review of their case by the ATF or an exception from the State Department were general and were modified or became more specific only after subsequent notices had been issued. The Craig Amendment provided yet another basis for relief from the import ban for "in transit" goods, under which plaintiffs were required to submit a new application for relief, or, if needed, to supplement existing applications. Further, the procedures outlined in the administrative notices failed to indicate, nor have defendants provided, any time frame for the ATF or State Department to complete their deliberation of plaintiffs' applications for relief. This fact is particularly important, as the exhaustion of administrative remedies is not mandated by statute and thus the statute of limitations for plaintiffs to bring their claims is not tolled. Failure to address plaintiffs' challenge to the import embargo now may result in forfeiture of their judicial remedies.

Finally, plaintiffs are not merely alleging an irregularity in the agency proceedings, but rather challenge the legality of the import embargo. Thus, the purposes of exhaustion, such as to prevent premature interference with agency proceedings so that it may have the opportunity to correct its own errors, may not be served by requiring plaintiffs to exhaust administrative remedies. *See Bowen v. City of New York,* 476 U.S. 467, 484 (1986) (noting that agency's system-wide policy for determining eligibility for disability benefits, inconsistent with established regulations, did not require claimants to exhaust administrative remedies even though some claimants would have received benefits despite illegal policy). Based on these considerations, the court declines to require that plaintiffs exhaust the administrative remedies available.

II. *Authority Granted under the AECA:*

Section 2778 of the AECA provides:

> In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.

22 U.S.C. § 2778(a)(1). Executive Order No. 11,958 expressly delegates to the Treasury Department the authority to control the import of defense articles and defense services, "guided by the views of the Secretary

of State on matters affecting world peace, and the external security and foreign policy of the United States."[7] 22 U.S.C. § 2751 note, § 1(l)(2), at 718. Pursuant to this delegated authority, the Treasury Department has promulgated regulations pertaining to the importation of defense articles, and has maintained a designated list of such items, the U.S. Munitions List. *See* 27 C.F.R. §§ 47.1–.63 (1994); *see also* 27 C.F.R. Parts 178, 179 (1994) (pursuant to 27 C.F.R. § 47.2(b), defense articles regulated under Parts 178 and 179 are subject to import permit procedures thereunder). In order to effect the President's decision to ban imports of defense articles from China, the Secretary of State terminated China's exemption from the list of proscribed countries whose defense articles were subject to import restrictions. *See* 27 C.F.R. § 47.52. Consequently, Customs prohibited the import of such articles[8] and the ATF revoked all existing import permits as of May 28, 1994.

Plaintiffs contend that the congressionally-delegated authority under the AECA, "to control the import * * * of defense articles," does not authorize the administering agencies to declare and impose an import embargo on defense articles. Specifically, plaintiffs argue the term "control" as it is used in the statute is not prohibitory language, but rather is only intended to impose a regulatory and licensing framework on the import and export of defense articles.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), describes the standard to be applied to determine whether or not an agency has acted within the authority granted by Congress. *Chevron* indicates that

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue * * *. for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines [that] * * * the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842–43 (footnotes omitted). In addition, the court notes that in areas of foreign policy, an agency is given even broader discretion to interpret statutorily-granted authority. *See Samora v. United States*, 406 F.2d 1095, 1098 (5th Cir. 1969) (noting that authority given to President may be broader, and requisite standards more general, in matters of foreign policy than in matters purely domestic) (citing *Zemel v. Rusk*, 381 U.S. 1 (1965)).

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[7] Executive Order No. 11958 delegates to the Secretary of State the authority to, *inter alia*, control the export of defense articles. 22 U.S.C. § 2751 note, § 1(l)(1), at 718.

[8] Pursuant to ATF regulations, Customs is authorized to

> take appropriate action to assure compliance with [27 C.F.R. Part 47] and with 27 C.F.R. Parts 178 and 179 as to the importation or attempted importation of articles on the U.S. Munitions Import List, whether or not authorized by permit.

27 C.F.R. § 47.56(a).

Based on a plain reading of the statute, the court does not find that Congress expressly articulated a policy with regard to the prohibition or banning of certain defense articles. The statute at issue does not define the term "control," and the legislative history does not offer further guidance as to the interpretation of the term. Furthermore, Congress has not defined the standard or means by which defense articles would be "controlled" with any great precision. Except in limited circumstances, there is no contrary language in the statute indicating congressional intent to limit the President's authority to control the import and export of defense articles which he may deem necessary to further the "foreign policy of the United States." *See* 22 U.S.C 2778(b)(2) (stating that no license shall be required for imports and exports made by U.S. agency for either official use or for carrying out any authorized foreign assistance or sales program).

Ordinarily, the word "control" means "[t]o exercise restraining or directing influence over; regulate; restrain; dominate; curb; to hold from action; * * * govern." *See Black's Law Dictionary* 399 (4th ed. 1951); *see also Perrin v. United States,* 444 U.S. 37, 42 (1979) (indicating that in statutory construction, unless otherwise defined, words take on their ordinary, common meaning). Section 2778 clearly grants the administering agencies a measure of discretion in determining the method to be used to control the import and export of such products. Contrary to plaintiffs' contention, the term "control" is not limited to control by licensing. The language of the statute was apparently cast in broad terms in order to encompass all situations falling within the scope of the stated objectives of the statute. *See* 22 U.S.C § 2778(a)(1). When Congress uses broad language in delegating authority to the President in the area of foreign relations, absent contrary language in the statute or legislative history, the court assumes "the legislators contemplate that the President may and will make full use of that power in any manner not inconsistent with the provisions or purposes of the Act." *South P.R. Sugar Co. v. United States,* 334 F.2d 622, 632 (Ct. Cl. 1964), *cert. denied,* 379 U.S. 964 (1965).[9]

If Congress wanted to limit the President's authority to "control" the trade of defense articles, it could have used more precise language indicating such intent. Instead, Congress delegated such decisions to the executive branch and the administering agencies' authority to promulgate implementing regulations, thus conferring broad discretion in determining whether or not to allow certain defense articles into the United States. Therefore, the court finds that the imposition of the import embargo under the AECA was a permissible construction of the statute and not inconsistent with statute's stated purposes. The court notes, however, that the administering agencies' regulatory action taken pursuant to the AECA is *ultra vires* and void if it is beyond the scope of the delegated authority. *See Target Sportswear, Inc. v. United States,*

[9] In fact, plaintiffs readily concede this point, stating that "grants of authority to the President in the area of foreign policy should be construed broadly." Pls.' Resp. Defs.' Mot. Summ. J. at 7.

Slip Op. 95–7, at 10–11 (Jan. 23, 1995). Hence, the court turns to the legality of the ATF's administration of the statute.

III. *ATF's Regulatory Implementation of the AECA:*

Plaintiffs admit that the ATF has "the authority to effectively block the importation of munitions through the use of licensing." Pls.' Resp. Defs.' Mot. Summ. J. at 10. They further admit that "the ATF reasonably may have construed the term 'control' to mean that the importation of defense articles effectively can be prohibited through the licensing process." *Id.* at 9. Plaintiffs allege, however, that this authority is limited to the ATF's denial of new import permits, and does not allow the revocation of existing import permits to achieve that purpose. The court disagrees with this construction of the statute.

Revocation by an agency of existing privileges or licenses to import into the United States, where such importation was found to be inconsistent with statutory policy, has met with approval in the courts. *See Ganadera Indus., S.A. v. Block,* 727 F.2d 1156, 1159–60 (D.C. Cir. 1984) (upholding agency's revocation of company's privilege to import meat and meat products where such importation was not in compliance with statutory standards); *Century Arms, Inc. v. Kennedy,* 323 F. Supp. 1002, 1016–17 (D. Vt.) (approving of Treasury Department's revocation of existing import licenses for surplus military firearms, prohibited from importation by recent legislation), *aff'd,* 449 F.2d 1306 (2d Cir. 1971) (per curiam), *cert. denied,* 405 U.S. 1065 (1972). In *Century Arms,* the court noted that in a comprehensive regulatory scheme with a licensing system, it was "aware of no licenses which once granted, can never be taken away." 323 F. Supp. at 1016. Thus, the court dismissed plaintiffs' argument that "once the federal government issues a license, and the license is relied upon, the license can never be revoked consistent with due process of law, until it should expire by its own terms." *Id.* at 1017.

Further, the denial or revocation of an import permit or license can, under certain circumstances, be a reasonable means to implement an embargo, and indeed, as the ATF states in its regulation, "[i]t is the policy of the United States to deny licenses and other approvals with respect to [imports of] defense articles and defense services originating in certain countries." *See* 27 C.F.R. § 47.52; *see also* 22 C.F.R. 126.1(a) (Department of State's similar listing of proscribed countries). Given the termination of China's exemption from import restrictions, and the ATF's expressly delegated authority under the AECA, the court finds the ATF's consequent revocation of the authority to import under existing permits to be reasonable and not arbitrary, capricious or manifestly

contrary to the purposes of the statute.[10] *See Chevron,* 467 U.S. at 844 ("[C]onsiderable weight should be accorded to an [agency's] construction of a statutory scheme it is entrusted to administer.").

Plaintiffs also contend that the ATF's revocation of their import permits was *ultra vires,* as the ATF allegedly did not have the authority to do so under the regulations cited. In revoking plaintiffs' import permits, the ATF specifically cited 27 C.F.R. § 47.44 as authority for its action, which provides that permits issued under that subpart may be "denied, revoked, suspended or revised without prior notice whenever the [ATF] finds the proposed importation to be inconsistent with the purpose or in violation of [22 U.S.C. § 2778] or the regulations in this part." 27 C.F.R. § 47.44. The scheme of the regulations provide, however, that the permit procedures of Part 47 of the C.F.R. are only applicable to those articles on the U.S. Munitions List that are not subject to import control under 27 C.F.R. Parts 178 (regulating firearms and ammunition) and 179 (regulating machine guns, destructive devices and certain other firearms). The regulations under Parts 178 and 179 contain, *inter alia,* specific procedures for the licensing of importers to deal in defense articles, as well as permit procedures for the importation of such goods.

Plaintiffs contend, and defendants concede, that plaintiffs' defense articles are regulated under Parts 178 and 179. Plaintiffs' contention, however, that these provisions do not authorize the revocation of their import permits, is without merit. The regulations concerning importation of defense articles under Part 178 expressly provide that

> [n]o firearm, firearm barrel, or ammunition shall be imported or brought into the United States by a licensed importer * * * unless the [ATF] has authorized the importation of [such products].

27 C.F.R. § 178.112(a).[11] As of May 28, 1994, the ATF has not authorized the importation of defense articles from China, and, as a result, all outstanding permits became null and void. *See* App. to Defs.' Mem. Supp. Mot. Summ. J., Ex. 5, at 2. As indicated, this is a permissible construction by the ATF of the congressional grant of authority under the AECA. Further, although Part 47 has specific provisions on revocation of permits, there is no language in Parts 178 or 179 expressly providing for or prohibiting the revocation of an import permit.[12] Under the regulatory scheme set forth, the court finds that the ATF's delegated authority in this situation has not been limited. Thus, it is unnecessary to reach the issue of whether the specific permit revocation provisions of Part 47

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[10] Plaintiffs further argue that Customs' actions in detaining the subject merchandise was *ultra vires* because plaintiffs possessed valid import permits that the ATF did not revoke until June 27, 1994. Plaintiffs' contention is without merit. Customs is authorized to take the appropriate action necessary to assure compliance with ATF regulations as to the importation of defense articles, whether or not authorized by permit. *See supra* note 8. As China's exemption from the list of proscribed countries prohibited from importing defense articles was terminated, importation became contrary to the stated policies of the ATF with respect to such countries. *See* 27 C.F.R. § 47.52; App. to Defs.' Mem. Supp. Mot. Summ. J., Ex. 5, at 1–2 (Customs' June 7, 1994 administrative notice). The court finds no error in this regard with Customs' implementation of the AECA and the regulations promulgated thereunder.

[11] The permit procedures of Part 178 are incorporated by reference into Part 179. *See* 27 C.F.R. § 179.111(b).

[12] The only provision in Part 178 dealing with the revocation of an importers' right to import defense articles is in the context of an importer's license, not a permit for entry of a particular quantity of goods. Under 27 C.F.R. § 178.73, the ATF is required to provide a pre-revocation opportunity for a hearing in the case of a willful license violation. This provision does not apply here as an importer license revocation is not at issue.

would also permit revocation of permits to importers licensed under Parts 178 and 179. Although the defense articles at issue are subject to importer licensing and permit requirements under Parts 178 and 179, the court finds that the ATF had authority to revoke current import permits in order to achieve the stated purpose of the embargo.[13]

Finally, plaintiffs allege that the ATF's actions were arbitrary, capricious and contrary to the purpose of the statute. The court disagrees. Ordinarily, Congress may delegate authority to the executive branch, if it specifies the basic principles to be advanced. *See J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the [President] is directed to conform, such legislative action is not a forbidden delegation of legislative power."). Section 2778(a) clearly lays down an intelligible principle to which the President must conform, that is, the President may control defense articles in the "furtherance of world peace and the security and foreign policy of the United States." 22 U.S.C. § 2778(a)(1); *see Samora,* 406 F.2d at 1098 (finding similar language in munitions control statute to be "sufficiently defined and the standards sufficiently definite"). The parties do not dispute that the President exercised his discretion and acted in what was in his judgment the furtherance of world peace, security, and foreign policy when he instituted the arms embargo against China. In fact, plaintiffs concede that the Chinese munitions embargo "was done for the articulated reasons of foreign policy." Pls.' Resp. Defs.' Mot. Summ. J. at 7. The President specifically stated that the embargo was to sanction China for its abuse of human rights—rights which the United States has long espoused. If the ATF were to wait for any outstanding licenses to expire, importers of such defense articles could purchase and import large quantities of Chinese goods under the outstanding permits, thereby partially defeating the President's goal. Therefore, it was reasonable for the ATF to immediately effectuate the embargo to advance the President's foreign policy decision to the maximum extent in order to sanction China for its abuses of human rights. Thus, the court does not find ATF's actions to have been arbitrary, capricious or not in accordance with law.

IV. *Plaintiffs' Challenge under the Due Process Clause and Takings Clause of the Fifth Amendment:*

A. Due Process Challenge

Plaintiffs' constitutional claim rests in part on its contention that the imposition of the Chinese munitions embargo violated the due process requirements of the Fifth Amendment. *See* U.S. Const., amend. V, cl. 3. Specifically, plaintiffs rely upon the principle that the government may not deprive a person of a protected property interest without providing

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[13] If the ATF's citation to Part 47 was in error, it is of no import as revocation of plaintiffs' existing permits was permissible under Parts 178 and 179, and plaintiffs have demonstrated no prejudice resulting from the citation itself. *Cf. Belcher v. Director, OWCP,* 895 F.2d 244, 246 (6th Cir. 1989) (holding that agency's application of wrong regulation was harmless error as petitioner failed to establish total disability meriting benefits under either provision).

constitutionally adequate procedural safeguards. *See, e.g., Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541 (1985).

Plaintiffs raise two arguments in support of their claim. First, plaintiffs contend that the government restricted their legal right to import Chinese defense articles under existing validly-issued import permits, between the time the embargo was enforced and June 27, 1994, the point at which the ATF, according to plaintiffs, revoked those permits. Plaintiffs' argument is flawed in that the ATF's authorization of existing import permits became null and void as of May 28, 1994, the same date that the embargo was put in place. *See supra* note 8. Contrary to plaintiffs' assertion, the June 27, 1994 letter was not the date of revocation of existing permits, but rather constituted notice to affected importers. As indicated, Customs and the ATF were authorized to implement the ban on Chinese munitions by revoking existing import permits, thus plaintiffs possessed no legal right to import their products.

Defendants claim that plaintiffs' interest in its current import permits does not rise to the level of a protectable property interest implicating due process concerns, but rather is only a unilateral expectation of doing business in the United States. Although plaintiffs do not challenge this contention directly, the court will address this point as it appears to underlie some of plaintiffs' arguments.

It is well settled that no one has a constitutionally-protected right to import products excluded by Congress. *See The Abby Dodge,* 223 U.S. 166, 176–77 (1912) (determining that "no one can be said to have a vested right to carry on foreign commerce with the United States"); *Buttfield v. Stranahan,* 192 U.S. 470, 493 (1904) (stating that because of Congress' complete power over foreign commerce, "no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles * * * may be imported into this country and the terms upon which a right to import may be exercised"); *Arjay Assocs., Inc. v. Bush,* 891 F.2d 894, 896 (Fed. Cir. 1989) ("It is beyond cavil that no one has a constitutional right to conduct foreign commerce in products excluded by Congress."); *Ganadera Indus.,* 727 F.2d at 1160 (finding no constitutionally-protected right to import). These cases, however, do not squarely address the issue of whether, by virtue of granting a permit or license to import products, the government has conferred a "legitimate claim of entitlement" invoking the government's constitutional obligations under the Due Process Clause. *But see Century Arms,* 323 F. Supp. at 1017 (finding that Congress, in enacting statute prohibiting importation of surplus military firearms, divested agency of discretion to honor previously issued import permits, thus revocation of license not inconsistent with due process). The Supreme Court has noted that "[p]roperty interests * * * are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source." *Board of Re-*

gents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); *Cleveland Bd. of Educ.*, 470 U.S. at 538. Thus, in other contexts licenses have been found to constitute a protectable property interest for licensees, implicating due process concerns, where it has been found that state law creates a legitimate claim to entitlement. *See Barry v. Barchi*, 443 U.S. 55, 64 (1979) (horse trainer's license); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (driver's license).

In the present case, plaintiffs cannot point to any statutory provision granting them a legitimate claim of entitlement to import defense articles from China. The AECA only provides that

> no defense articles or defense services designated by the President * * * may be exported or imported without a license for such export or import, issued in accordance with this chapter and regulations issued under this chapter.

22 U.S.C. § 2778(b)(2). The court does not find that this or any other provision grants plaintiffs any entitlement to the continued importation of defense articles once a license has been issued. Rather it leaves such decisions to the President and to the agency to promulgate regulations to implement his authority. *See id.* § 2778(a)(1). Further, as previously noted, *supra*, the President was given broad discretion to control the import and export of defense articles in furtherance of foreign policy. Thus, the court finds that the ATF's revocation of plaintiffs' import license, which effectuated the President's decision to ban the importation of Chinese defense articles, did not require protection of due process rights. *See American Ass'n of Exporters and Importers-Textile and Apparel Group v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985) (finding that imposition of quotas by President under Agriculture Act of 1956, did not violate due process as no statute or international agreement conferred importers with basis for entitlement or proprietary interest); *Ganadera Indus.*, 727 F.2d at 1160 (holding that statute prohibiting importation of adulterated or misbranded meat and meat products, "affords no entitlement," thus no right to advance notice and hearing was available).

Plaintiffs' second argument is that the government deprived plaintiffs of their "ability to use, sell, transfer or control" their Chinese munition imports subject to the embargo. Plaintiffs contend they were permitted only two courses of action once the articles were prohibited entry into the United States: (1) destruction of the property under Customs' supervision, or (2) return back to Chinese manufacturers who allegedly have a "no refund" policy. Plaintiffs' contention is erroneous.

Customs' administrative notice of August 5, 1994, and the ATF's subsequent letter of August 10, 1994, specifically provided that imported articles subject to the embargo could either be: (1) returned to China or country of origin by August 31, 1994 without further governmental approval, (2) retained in a bonded warehouse until an export license was obtained, if not exported prior to August 31, 1994, (3) excepted from the ban (determined on a case-by-case basis), if requested by the importer,

or (4) destroyed under Customs' supervision. *See* Pls.' Mem. P. & A. Supp. Mot. Summ. J., Exs. F-G. Thus, plaintiffs were not limited only to the choices of destruction or returning goods to the manufacturer. Further, plaintiffs cite no additional support indicating the embargo compromised plaintiffs' "ability to use, sell, transfer or control" its products.[14] The only potential property interest compromised by the import embargo was plaintiffs' ability to import its products into the United States, which the court finds not to constitute a protectable property interest triggering due process protection. Thus, plaintiffs' argument fails.

B. Takings Clause Challenge[15]

Plaintiffs' contention that the government has taken its property without just compensation under the Takings Clause of the Fifth Amendment is similarly without merit. Again, plaintiffs' challenge is based on their assertion that the government's regulatory actions deprived them of use, title, possession and control over their goods by limiting plaintiffs to two options for the disposal of their property. As indicated, this argument is without merit. The only interest compromised by the embargo was plaintiffs' expectation of ultimately selling their goods in the United States. Such an interest is not a protectable property interest under the Fifth Amendment. *See Mitchell Arms, Inc. v. United States,* 7 F.3d 212, 217 (Fed. Cir. 1993) (finding importer's expectation of ultimate market disposition of its product is "collateral interest," incident to importer's ownership of goods, and is not property interest protected under Fifth Amendment), *cert. denied,* 114 S.Ct. 2100 (1993). Thus, the court rejects plaintiffs' claim under the Takings Clause of the Fifth Amendment.

CONCLUSION

The court does not find that further exhaustion of administrative remedies is required prior to court resolution in this case. Further, the court holds that the AECA authorizes the imposition of the President's import embargo on defense articles from China. The actions taken by the administering agencies to effect the import embargo were similarly authorized and were not arbitrary, capricious or contrary to the stated

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[14] Presumably, if no market existed in China for the merchandise, it could be reshipped to another non-U.S. destination. Plaintiffs have not demonstrated the contrary.

[15] Defendants urge the court to decline to exercise jurisdiction over plaintiffs' takings claim, contending that this issue is more appropriately brought before the United States Claims Court. The court disagrees. Section 1581(i) of Title 28 provides that

> the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> * * * * * * * *
>
> (3) embargoes, or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety.

28 U.S.C. § 1581(i) (1988). In addition, 28 U.S.C. § 1367(a) states that district courts "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form a part of the same case or controversy." 28 U.S.C. § 1367(a) (Supp. II 1990). This provision extends to the Court of International Trade under 28 U.S.C. § 1585 (1988). *Associacao dos Industriais de Cordoaria e Redes v. United States,* 828 F. Supp. 978, 988 n.16 (Ct. Int'l Trade 1993). Either the takings claim arises out of an import embargo, which defendants dispute, or supplemental jurisdiction applies, as defendants concede. Given the intertwining of the issues, it would be a waste of judicial resources to transfer this claim to the Court of Federal Claims for disposition, even if primary jurisdiction lies in that court.

objectives of the embargo. Finally, plaintiffs' constitutional claims are without merit. Plaintiffs' motion for summary judgment denied. Defendants' motion for summary judgment granted.

PUBLIC VERSION

(Slip Op. 95–15)

AUSIMONT USA, INC. AND AUSIMONT SPA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND E.I. DU PONT DE NEMOURS & CO., INC., DEFENDANT-INTERVENOR

Court No. 93–05–00282

[The ITA's final affirmative anti-circumvention determination is affirmed.]

(Decided February 1, 1995)

Steptoe & Johnson, (Daniel J. Plaine, Robert T. Novick, Mark A. Barnett, Gary L. Goldsholle) for plaintiffs Ausimont USA Inc. and Ausimont SpA.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Michael S. Kane),* of counsel: *J.C. Lowe,* Import Administration, U.S. Department of Commerce for defendant.

Wilmer, Cutler & Pickering, (John D. Greenwald, Ronald I. Meltzer) for defendant-intervenor E. I. Du Pont de Nemours & Co., Inc.

OPINION

MUSGRAVE, *Judge:* In this action, plaintiffs Ausimont SpA and Ausimont USA (collectively "Ausimont") have contested the final affirmative anti-circumvention determination by the International Trade Administration, U.S. Department of Commerce ("ITA" the "Department" or "Commerce"): *Granular Polytetrafluoroethylene Resin From Italy; Final Affirmative Determination of Circumvention of Antidumping Duty Order,* 58 Fed. Reg. 26,100 (April 30, 1993). Ausimont argues that the ITA committed reversible error in finding that Ausimont's imports of polytetrafluoroethylene ("PTFE") wet raw polymer from Italy circumvented the outstanding antidumping order against granular PTFE resin.

BACKGROUND[1]

Ausimont produces a broad array of fluoropolymer and other chemical products, including granular PTFE resin. Ausimont USA operates production facilities in Thorofare, New Jersey and Orange, Texas. Ausimont SpA also operates production facilities in Spinetta, Italy. In its

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[1] The administrative record filed with the Court is contained on 28 separate micro-fiches. Documents are identified by their respective fiche and frame numbers: "C.R. Document ___, Fi. ___, Fr. ___" for proprietary documents and "P.R. Document ___, Fi. ___, Fr. ___" for public documents.

Texas facility, Ausimont processes PTFE wet raw polymer into other products, including granular PTFE resin and lubricant powder. *Memorandum In Support of Plaintiffs' Motion For Judgment Upon the Agency Record ("Plaintiffs' Memorandum"),* at 3.

On June 21, 1991, E. I. Du Pont de Nemours ("Du Pont") petitioned the ITA to conduct an inquiry into whether imports of "PTFE wet raw polymer" were within the scope of the antidumping duty order on finished granular PTFE resin from Italy. *See Antidumping Duty Order; Granular Polytetrafluoroethylene Resin From Italy,* 53 Fed. Reg. 33,163 (August 30, 1988) *("Order").* On October 15, 1991, Du Pont revised its petition to request that the ITA conduct an anti-circumvention inquiry pursuant to 19 U.S.C. § 1677j(a) (1988). C.R. Document 2, Fi. 17, Fr. 25. 19 U.S.C. § 1677j(a) provides in relevant part:

(a) Merchandise completed or assembled in the United States

(1) In general

If—

(A) merchandise sold in the United States is of the same class or kind as any other merchandise that is the subject of—

(i) an antidumping duty order issued under section 1673e * * *.

(B) such merchandise sold in the United States is completed or assembled * * * from parts or components produced in the foreign country with respect to which such order or finding applies, and

(C) the difference between the value of such merchandise sold in the United States and the value of the imported parts and components referred to in subparagraph (B) is small,

the administering authority * * * may include within the scope of such order or finding the imported parts or components referred to in subparagraph (B) that are used in the completion or assembly of the merchandise in the United States at any time such order or finding is in effect.

(2) Factors to consider

In determining whether to include parts or components—in a[n] * * * antidumping duty order or finding under paragraph (1), the administering authority shall take into account such factors as—

(A) the pattern of trade,

(B) whether the manufacturer * * * of the parts or components is related to the person who assembles or completes the merchandise sold in the United States * * * , and

(C) whether imports into the United States of the parts or components * * * have increased after the issuance of such order or finding.

On November 18, 1991, pursuant to Du Pont's request and 19 U.S.C. § 1677j(a), the ITA initiated an anti-circumvention investigation to determine whether Ausimont was circumventing the *Order* by importing PTFE wet raw polymer from Italy for completion or assembly into gran-

ular PTFE resin in the United States. 56 Fed. Reg. 64,588 (1991), P.R. Document 4, Fi. 1, Fr. 36; P.R. Document 5, Fi. 1, Fr. 40.

A. *Preliminary Determination:*

The ITA issued Ausimont an initial questionnaire on December 2, 1991, requesting general information. P.R. Document 6, Fi. 1, Fr. 45. Ausimont responded on December 16, 1991 and January 21, 1992. C.R. Document 4, Fi. 17, 18, Fr. 30; C.R. Document 5, Fi. 18, Fr. 5. Subsequently, prior to the preliminary determination, the ITA issued Ausimont four more questionnaires,[2] and Ausimont provided the ITA with extensive sales and cost of production information.[3]

On August 31, 1992, the ITA issued its affirmative preliminary circumvention determination. *Granular Polytetrafluoroethylene Resin From Italy; Preliminary Affirmative Determination of Circumvention of Antidumping Duty Order,* 57 Fed. Reg. 43,218 (1992) *("PTFE Preliminary").* In the *PTFE Preliminary,* the ITA, applying the criteria set forth in 19 U.S.C. § 1677j(a)(1), found that the granular PTFE resin produced at Ausimont's Texas facility *was the same class or kind of merchandise* as the imported granular PTFE resin. In addition, the ITA determined that the granular PTFE resin produced in the United States was manufactured from PTFE wet raw polymer imported from Italy, whose resin is subject to the *Order. Id.; see* 19 U.S.C. § 1677j(a)(1)(B).

The ITA next attempted to determine whether the difference in value between the finished granular PTFE resin produced in the United States and the PTFE wet raw polymer imported from Italy was *small. See* 19 U.S.C. § 1677j(a)(1)(C). The ITA determined the value of the finished granular PTFE resin based upon its final *ex-factory selling price*[4] in the United States. *PTFE Preliminary,* 57 Fed. Reg. at 43,219. By contrast, the ITA was unable to rely upon market prices to determine the value of PTFE wet raw polymer because there is no market for such a product and Ausimont had not sold PTFE wet raw polymer to, or purchased it from, any unrelated party. *Id.* As a consequence, the ITA calculated a base value for the PTFE wet raw polymer using Ausimont's costs of production at Ausimont's Texas facility. *Id.* The ITA then adjusted this value downward by a deduction for losses calculated by multiplying Ausimont's general expenses and losses at its Texas facility by the ratio of the cost of production of the PTFE wet raw polymer to the total cost of the finished granular PTFE resin. *Id.; PTFE Preliminary-Preliminary Difference-In-Value Analysis Memo,* C.R. Document 14, Fi. 25, Fr. 60.

Applying this methodology, the ITA calculated an apparent difference in value of [ ] percent. *Id.* The ITA, however, determined that this method significantly overstated the difference in value because the deduction for losses was artificially inflated as a result of

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[2] P.R. Document 10, Fi. 2, Fr. 30; P.R. Document 21, Fi. 7, Fr. 71; P.R. Document 23, Fi. 8, Fr. 63; C.R. Document 12, Fi. 25, Fr. 10.

[3] *See* C.R. Document 6, Fi. 18–22, Fr. 79; C.R. Document 8, Fi. 22, Fr. 83; C.R. Document 9, Fi. 23, Fr. 1; C.R. Document 10, Fi. 24, Fr. 5; C.R. Document 13, Fi. 25, Fr. 15.

[4] The ITA calculated the *ex-factory selling price* by deducting U.S. inland freight from the reported selling price. *PTFE Preliminary,* 57 Fed. Reg. at 43,219.

the [ ] losses that Ausimont sustained at its Texas facility during the period of inquiry—losses that totaled approximately [ ] percent of Ausimont's production costs. *Id.* The ITA contends that these losses were the inevitable result of the anomalous start-up cost, [ ] fixed costs, and [ ] capacity utilization at Ausimont's Texas facility. *Id.*[5] The impact of these [ ] losses upon the difference in value calculation was to increase the apparent difference in value dramatically from the [ ] percent figure that would have been obtained absent the deduction for losses at the Texas facility. *Id.* at Fr. 61; *PTFE Preliminary,* 57 Fed. Reg. at 43,319–20.

The ITA concluded that Ausimont's [ ] losses unreasonably "inflated" the difference in value between finished granular PTFE resin and PTFE wet raw polymer and, therefore, did "not provide a realistic measure of the true difference in value." *PTFE Preliminary,* 57 Fed. Reg. at 43,220. For this reason, the ITA determined that it was "both necessary and appropriate to place greater emphasis on" the other indicators of the difference in value between the granular PTFE resin and the PTFE wet raw polymer—*i.e.,* qualitative, descriptive factors. *Id.*

The ITA ascertained that in order to more accurately determine the value added by processing PTFE wet raw polymer into finished granular PTFE resin at Ausimont's Texas facility, it analyzed the operations performed at the Texas facility in the context of the "complete integrated production process for granular PTFE resin," as described in the International Trade Commission's ("ITC") original investigation and an encyclopedia of chemical technology. *Id. (citing ITC Final Determination,* USITC Pub. 2042, August 1988 at A–5 and Kirk-Othmer, 11 *Encyclopedia of Chemical Technology* 3 (1980)). The ITA described the process for manufacturing PTFE wet raw polymer as follows:

> The process begins with the production of tetrafluoroethylene (TFE) monomer. Production of TFE monomer involves the production of hydrogen fluoride and chloroform, which are combined and converted to TFE monomer through a procedure known as pyrolysis. Because pyrolysis yields by-products that adversely affect TFE monomer polymerization, the TFE monomer must be purified using an extremely complex refinement process.
>
> After purification, the TFE monomer, which is stored in liquid form, is subject to a process known as polymerization, which is also fairly complex. During this process, the TFE monomer is combined with an initiator and vigorously agitated to produce the solid raw polymer, which is the product being imported by Ausimont.

Id. (citations omitted).

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[5] Specifically, Ausimont's Texas facility was designed to process [ ] million pounds of finished resin per year, or [ ] pounds between its opening in December 1990, and October, 1991, the end of the period of inquiry. *PTFE Preliminary-Preliminary Difference-In-Value Analysis Memo,* C.R. Document 14, Fi. 25, Fr. 60. The facility, however, processed only [ ] pounds during that period, or approximately [ ] of the anticipated capacity. *Id.* at Fr. 61.

The ITA stated that the only processing that Ausimont performs in the United States is the post-treatment cutting and drying of the PTFE wet raw polymer. *Id.* According to the ITA, Ausimont "does not add any additional materials to the PTFE wet raw polymer, nor does it alter in any way the chemical composition of PTFE wet raw polymer." *Id.*[6]

The ITA contrasted Ausimont's processing of PTFE wet raw polymer to the facts of other anti-circumvention investigations in which the value added during the completion of finished merchandise in the United States was found to be not small, in part, because respondents added numerous materials and performed a variety of complex operations to the imported components in the United States. *Id. (citing Portable Electric Typewriters From Japan: Negative Preliminary Determination of Circumvention of Antidumping Duty Order,* 56 Fed. Reg. 46,594, 46,596 (1991) *("PETs Preliminary"); Certain Internal-Combustion Industrial Forklift Trucks From Japan; Negative Preliminary Determination of Circumvention of Antidumping Duty Order,* 54 Fed. Reg. 50,260, 50,261, 50,282 *("Forklifts Preliminary")* (1989)). The ITA also noted that in these other anti-circumvention investigations, United States production facilities comparable in scale to home market facilities, as well as respondents' significant investment in such facilities, had further demonstrated that the value added to imported components in these facilities was not small. *Id. (citing PETs Preliminary,* 56 Fed. Reg. 46,594, 46,596 (1991); *Forklifts Preliminary,* 54 Fed. Reg. 50,260, 50,261, 50,282 (1989)). The ITA concluded that it lacked such comparative information regarding Ausimont's United States production facility, but indicated that it would request this information prior to its final determination. *PTFE Preliminary,* 57 Fed. Reg. at 43,220–21. The ITA, however, made a preliminary determination that the value added by the processing of PTFE wet raw polymer into granular PTFE resin was small, thereby indicating that the difference in value between polymer and resin was small. *Id.*

The ITA next analyzed the market factors set forth in 19 U.S.C. § 1677j(a)(2). The ITA found that Ausimont SpA and its Texas-based subsidiary were related. *Id.* at 43,221. The ITA also found that (1) Ausimont had shifted its pattern of trade away from imports of finished granular PTFE resin in favor of imports of PTFE wet raw polymer, with an increase in polymer imports of nearly fourfold during the period of inquiry; (2) this shift corresponded to the commencement of operations at Ausimont's Texas facility in December, 1990 (after the issuance of the *Order* on granular PTFE resin); and (3) Ausimont imported PTFE wet raw polymer into the United States for the sole purpose of producing finished granular PTFE resin. *Id.* Combined with its finding that the difference in value between the PTFE wet raw polymer and the granular PTFE resin was small, the ITA determined that these market factors supported a preliminary affirmative determination of circumvention. *Id.*

[6] The ITA explained that PTFE wet raw polymer has the same chemical characteristics and composition as granular PTFE resin. *PTFE Preliminary,* 57 Fed. Reg. at 43,220.

B. *Final Affirmative Determination:*

Subsequent to its preliminary determination, the ITA issued two more questionnaires requesting: (1) detailed descriptions of Ausimont's Italian production processes for PTFE wet raw polymer and granular PTFE resin; (2) data regarding the costs of Ausimont's finishing operations in Italy; (3) data regarding investment, employment, and output levels at Ausimont's Italian facility; and (4) production data from Ausimont's current Texas and former New Jersey facilities. P.R. Document 35, Fi. 10, Fr. 87; P.R. Document 48, Fi. 11, 12, Fr. 98. Ausimont responded on October 19 and November 13, 1992. C.R. Document 15, Fi. 25, 26, Fr. 70; C.R. Document 18, Fi. 26, Fr. 27.

The ITA issued its final affirmative anti-circumvention determination on April 30, 1993. *Granular Polytetrafluoroethylene Resin From Italy; Final Affirmative Determination of Circumvention of Antidumping Duty Order,* 58 Fed. Reg. 26,100 (April 30, 1993) *("PTFE Final Determination").* The ITA compared per-unit costs for the processing performed in Ausimont's Texas facility to the per-unit costs for substantially similar processing performed in Ausimont's Italian facility. The ITA confirmed its preliminary determination that the [ ] losses incurred at the Texas facility were due to [ ] start-up costs and the fact that the Texas facility did not operate at full capacity. *Id.* at 28,101–04; *PTFE Final Determination-Final Difference-In-Value Analysis Memo,* C.R. Document 26, Fi. 28, Fr. 82. As a consequence, the ITA determined that the substantially similar costs of processing PTFE wet raw polymer into granular PTFE resin in Italy—*i.e.,* costs related to the post-treatment cutting and drying of the polymer—were a more accurate reflection of the actual costs than expenses incurred in the underutilized Texas facility. *PTFE Final Determination,* 58 Fed. Reg. at 20,202; *PTFE Final Determination-Final Difference-In-Value Analysis Memo,* C.R. Document 26, Fi. 28, Frs. 86–87.

As a result, in calculating the difference in value between the finished granular PTFE resin produced in the United States and the PTFE wet raw polymer imported from Italy for purposes of the final determination, the ITA determined a final *ex-factory selling price* for the finished granular PTFE resin in the United States and a base value for PTFE wet raw polymer representing the costs of production. *PTFE Final Determination,* 58 Fed. Reg. at 20,202. In contrast to the preliminary determination, however, the ITA calculated the deduction for losses using data from Ausimont's Italian operations instead of the data from Ausimont's Texas facility. The ITA determined that these calculations demonstrated that the difference in value between granular PTFE resin and PTFE wet raw polymer is only [ ] percent. *PTFE Final Determination-Final Difference-In-Value Analysis Memo,* C.R. Document 26, Fi. 28, Fr. 91.

In addition, the ITA asserts that it confirmed its preliminary determination that the processing performed at Ausimont's Texas facility are

"relatively simple" finishing operations "that constitute only a slight change in methods of production or shipment." *PTFE Final Determination,* 58 Fed. Reg. at 28,103; *PTFE Final Determination-Final Difference-In-Value Analysis Memo,* C.R. Document 26, Fi. 28, Frs. 82–86. The ITA found that the operations that Ausimont performs in the United States represent only a fraction of the manufacturing process that Ausimont performs in Italy. Moreover, the ITA found that Ausimont's investment in its United States operations is relatively minor compared to the level of investment required to establish an integrated production facility. *PTFE Final Determination,* 58 Fed. Reg. at 20,102. On this basis, the ITA confirmed that the difference in value of [ ] percent is small.

DISCUSSION

In reviewing injury, antidumping, and countervailing duty investigations and determinations, this Court must hold unlawful any determination unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1982). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) *(quoting Consolidated Edison Co. v. Labor Board,* 305 U.S. 197, 229 (1938)). Substantial evidence supporting an agency determination must be based on the whole record. *See Universal Camera Corp.,* 340 U.S. at 488. The "whole record" means that the Court must consider both sides of the record. It is not sufficient to examine merely the evidence that sustains the agency's conclusion. *Id.* In other words, it is not enough that the evidence supporting the agency decision is "substantial" when considered by itself. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. *Id.* at 478, 488.

The interpretation of the laws administered by Commerce should be sustained if that interpretation is reasonable. *United States v. Zenith Radio Corp.,* 64 CCPA 130, C.A.D. 1195, 562 F.2d 1209 (1977), *aff'd,* 437 U.S. 443 (1978); *American Lamb Company v. United States,* 785 F.2d 994 (Fed. Cir. 1986). Furthermore, this Court should not reject the interpretation of a statute or regulation administered by an agency unless it has compelling reasons to do so. *Wilson v. Turnage,* 791 F.2d 151, 155–56 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 988 (1986).

The Supreme Court has held, with regard to judicial review of an agency's construction of a statute it administers, that absent direct Congressional instruction as to the precise question at issue, the question for the Court to decide is whether the agency's interpretation is based upon a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Where the agency's interpretation of a statute represented a reasonable accommodation of manifestly competing interests, it was entitled to deference. *Id.* at 865. Since Commerce administers the trade laws and its implementing regulations, it is entitled to deference in its reasonable in-

terpretations of those laws and regulations. *PPG Industries, Inc. v. United States*, 13 CIT 297, 299, 712 F. Supp. 195, 198 (1989), *aff'd*, 978 F.2d 1232 (Fed. Cir. 1992). This should not suggest the vacation of meaningful judicial review, but rather a recognition that administrative agencies must be permitted to effectively employ their administrative expertise in carrying out their legislative mandates. *Id.*

Ausimont argues that the ITA's interpretation and application of the "difference in value" provision of 19 U.S.C. § 1677j(a)(1)(C) were not in accordance with law in two respects. First, the ITA failed to base its determination of whether the difference in value was *small* on the 38–55 percent figure it calculated under its "customary" methodology. Second, the ITA erroneously introduced qualitative factors, which may properly be analyzed *only* under 19 U.S.C. § 1677j(a)(2), into its analysis of the difference in value in 19 U.S.C. § 1677j(a)(1)(C). *Plaintiffs' Memorandum*, at 11.

Ausimont contends that the ITA in its final determination recognized that the difference in value between imported PTFE wet raw polymer and the granular PTFE resin produced in Texas from the imported wet raw polymer was 38–55 percent. *Id.* at 11–12; *PTFE Final Determination*, 58 Fed. Reg. at 26,101. This result was calculated by the ITA using figures supplied by Ausimont's Texas and Italian facilities in the first five questionnaire responses and in accordance with the ITA's "customary" method of calculation.[7] *Plaintiffs' Memorandum*, at 12 n.10 and 11. Ausimont asserts that neither the ITA nor the petitioners ever raised any questions as to the accuracy, completeness, correctness or verifiability of the figures used in this calculation. *Id.* at 13.

Ausimont asserts that despite the ITA's complete acceptance of the underlying figures and its recognition of the correct "customary" methodology used to calculate the 38–55 percent difference in value, the ITA refused to rely on it as the basis of either its preliminary or final determinations. *Id.* Ausimont argues that in the final determination the ITA committed error by adopting a methodology to calculate the difference in value which was neither suggested in its preliminary determination nor briefed by the parties. *Id.* at 14.

Relying on information Ausimont provided in two questionnaires issued after the preliminary determination, the ITA substituted the production costs of Ausimont's Italian facility in place of the production costs of Ausimont's Texas facility in the difference in value calculation. Because the capacity utilization was higher in Italy and the per-unit costs lower, the ITA concluded that Ausimont costs for converting imported PTFE wet raw polymer into granular PTFE resin at the Texas

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[7] As recognized in the *PTFE Final Determination*, the ITA's calculation of the value of the PTFE wet raw polymer consists of: 1) calculating the profit or loss in the United States by deducting from the U.S. selling price of the granular PTFE resin produced in the United States both a) the processing costs and general expenses incurred in the United States and b) the relevant costs and expenses incurred in the home market; and 2) allocating a portion of the resulting profit or loss and a portion of the U.S. general expenses to the cost of production of the PTFE wet raw polymer. *PTFE Final Determination*, 58 Fed. Reg. at 26,101.

Under the ITA's standard methodology, this value of PTFE wet raw polymer is to be deducted from the value of the granular PTFE resin produced in Texas to obtain the absolute difference in value. The resulting difference in value is then divided by the value of the granular PTFE resin to yield the relevant difference in value percentage. *Id.*

facility were unreliable and the costs incurred at Ausimont's Italian facility provided a more reasonable basis. Based upon that substitution, the ITA calculated a difference in value of 10–20 percent. *PTFE Final Determination,* 58 Fed. Reg. at 26,102. Ausimont argues that this is simply unacceptable under the statute and ITA practice. *Plaintiffs' Memorandum,* at 19 *et seq.* Ausimont argues that the plain language of the anti-circumvention statute provides that the ITA is to calculate the "difference between the value of such [product] sold in the United States and the value of the imported parts and components * * *." *See* 19 U.S.C. § 1677j(a)(1)(C). By defining one element of the difference in value calculation as "the value of [the] product sold in the United States," Congress contemplated that the ITA would base its determination on the costs incurred at the U.S. production facility to process the imported parts or components into the finished product. *Plaintiffs' Memorandum,* at 20. Ausimont argues that this substituted data is simply not relevant to whether circumvention is occurring. Ausimont contends that the difference in value which is relevant to ITA's determination results from processing that occurred at the Texas facility. *Id.*

Furthermore, Ausimont argues that in addition to the statutory basis for rejecting the substitution of costs incurred at a different facility, the ITA itself has previously recognized factual reasons for declining to compare even investment levels at different facilities. *Id.* at 20–21; *See Certain Internal-Combustion, Industrial Forklift Trucks From Japan; Negative Final Determination of Circumvention of Antidumping Duty Order ("Forklifts Final Determination"),* 55 Fed. Reg. 6,028, 6,029 (1990) ("comparisons are inappropriate because they do not account for a variety of factors that affect investment levels, such as volume of production and types of products manufactured."). Ausimont asserts that the administrative record before this Court contains a wealth of information regarding the significance of the differences between the Ausimont USA and Ausimont SpA facilities. Among those differences are: 1) the production volumes and capacity for Ausimont SpA are significantly different from those of Ausimont USA;[8] 2) the Ausimont SpA facility produces a number of products in addition to granular PTFE resin whereas the Ausimont USA facility produces only two other products;[9] 3) Ausimont SpA facility is significantly depreciated whereas Ausimont USA operates a new, state-of-the-art system;[10] 4) Ausimont USA uses new, computer-controlled technology and processes, many of which differ from those used by Ausimont SpA;[11] 5) the two companies operate

[8] *See* Ausimont's October 19, 1992 submission at 19 (P.R. Fi. 11, Fr. 69, C.R. Fi. 25, Fr. 94) *(Plaintiffs' Memorandum,* Attachment E) *(Ausimont SpA's production volumes);* Ausimont's May 18, 1992 submission at Ex. 5 (P.R. Fi. 9, Fr. 43, C.R. Fi. 24, Fr. 63) *(Plaintiffs' Memorandum,* Attachment F) *(Ausimont USA's production volumes).*

[9] *See* Ausimont's October 19, 1992 submission at 15–16 (P.R. Fi. 11, Fr. 65–66, C.R. Fi. 25, Fr. 90–91) *(Plaintiffs' Memorandum,* Attachment G) *(products produced at Ausimont SpA's facility);* Ausimont's January 21, 1992 submission at 3 (P.R. Fi. 2, Fr. 81, C.R. Fi. 18, Fr. 15) *(Plaintiffs' Memorandum,* Attachment H) *(products produced at Ausimont USA's facility).*

[10] *See Ausimont's Rebuttal Brief* dated December 14, 1992 at 41, 48 (P.R. Fi. 12, Fr. 97, Fi. 13, Fr. 6, C.R. Fi. 28, Fr. 7, 14) *(Plaintiffs' Memorandum,* Attachment I)

[11] *See* Ausimont's October 19, 1992 submission at Ex. 1 (P.R. Fi. 11, Fr. 73–76, C.R. Fi. 25, Fr. 98, Fi. 26, Fr. 1–3) *(Plaintiffs' Memorandum,* Attachment J) *(Ausimont USA's production process); Id.* at 10–14 (P.R. Fi. 12, Fr. 60–64, C.R. Fi. 25, Fr. 85–89) *(Plaintiffs' Memorandum,* Attachment K) *(Ausimont SpA's production process).*

under completely different government regulatory structures and myriad other factors which affect the operating costs of each plant *(e.g.* environmental controls, water purity, *etc.*).[12] *Plaintiffs' Memorandum,* at 22–23.

In addition, Ausimont argues that the statutory framework established by Congress requires that the ITA first determine whether the three prerequisite criteria have been established before considering other factors. Ausimont argues that the ITA's authority to consider qualitative factors is based on 19 U.S.C. § 1677j(a)(2), which permits the consideration of three factors "enumerated" therein, as well as additional "unenumerated" factors, *only* after the threshold criteria of 19 U.S.C. § 1677j(a)(1) have been established. *Id.* at 25. Essentially, Ausimont argues that the determination of whether the difference in value is *small* is a threshold inquiry that *must precede* any analysis of qualitative factors. Ausimont argues that the ITA failed to base either the preliminary or final determination on whether that numeric difference in value was small. Instead, in each case, the ITA improperly relied on its consideration of three qualitative factors[13] in addition to the numeric difference in value to determine whether the difference in value was small. *Id.* at 26.

Ausimont asserts that the arguments which will be made by the parties in this case are analogous to those made in *Smith Corona Corp. v. United States,* 17 CIT ____, 811 F. Supp. 692 (1993). *Plaintiffs' Memorandum,* at 9–10. In that case, the ITA understood that it was required to determine, as a threshold matter, whether the difference in value between the imported parts and components and goods sold in the United States was small. *Only* if that difference in value was *small* did the ITA claim to have the discretion to include the parts and components in the antidumping order, subject to its evaluation of the factors set forth in 19 U.S.C. § 1677j(a)(2). Smith Corona (like the ITA in this case), argued that 19 U.S.C. § 1677j(a)(1) is a general clause and that the ITA is required to consider the factors in 19 U.S.C. § 1677j(a)(2) prior to making any determination. The Court in *Smith Corona Corp.,* found that the ITA's interpretation there comported with the plain meaning of the statute. The Court rejected Smith Corona's arguments based on congressional intent as meritless and irrelevant in light of the clear statutory language. *Smith Corona Corp.,* 17 CIT at ____, 811 F. Supp. at 694.

The ITA contends that Ausimont's arguments are without any support in the statute, the legislative history, or the case law. Absent from 19 U.S.C. § 1677j(a)(1)(C) is any definition of the terms "value" or

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[12] *See Ausimont's Rebuttal Brief* dated December 14, 1992 at 48 (P.R. Fi. 13, Fr. 6, C.R. Fi. 28, Fr. 14) *(Plaintiffs' Memorandum,* Attachment I); Ausimont's October 19, 1992 submission at 10–14 and Ex. 1 (P.R. Fi. 12, Fr. 60–64, 73–76, C.R. Fi. 25, Fr. 85–89,, Fi. 26, Fr. 1–3) *(Plaintiffs' Memorandum,* Attachments J & K).

[13] The ITA considered: 1) the nature of the processing performed in the United States compared with a fully-integrated facility for producing granular PTFE resin; 2) the extent of production facilities in the United States compared with the U.S. production facility previously operated by Ausimont USA; and 3) the level of investment by Ausimont USA in the Texas facility compared with the level of investment by Ausimont SpA in its Spinetta, Italy facility. *PTFE Final Determination,* 58 Fed. Reg. at 26,102.

"small." As the Senate Committee on Finance explained, this omission was intentional:

> The Committee has not attempted to develop a precise meaning for the term "small" as used in these sections, *principally in recognition that different cases present different factual situations.*

S. Rep. No. 71, 100th Cong., 1st Sess. 100 (1987) ("Senate Report") (emphasis added). Thus, the ITA argues that Congress recognizes what Ausimont does not: Commerce must be accorded substantial deference in determining whether the value added to imported "parts or components" in the United States is *small* within the meaning of 19 U.S.C. § 1677j(a)(1)(C) because the facts of circumvention vary from case to case. *Defendant's Memorandum In Opposition To Plaintiffs' Motion For Judgment Upon the Administative Record ("Defendant's Memorandum in Opposition"),* at 23.

The ITA argues that rather than restricting Commerce to a specific methodology or type of analysis, Congress intended exactly the opposite:

> While these subsections grant [Commerce] *substantial discretion in interpreting these terms,* and involving these measures, as to allow it the *flexibility* to apply the provision in an appropriate manner, the Committee expects [Commerce] to use this authority to the fullest extent possible to combat diversion and circumvention of the antidumping and countervailing duty laws.

Senate Report at 100 (emphasis added). Essentially, the ITA argues that Congress has purposefully given Commerce substantial discretion to interpret the terms "small" and "value" and the "flexibility" to employ whatever methodologies and analytical techniques are reasonable and appropriate under the facts of a specific case. *Defendant's Memorandum in Opposition,* at 24.

The ITA argues that Ausimont's assertion that it did not offer a reasoned explanation for its alleged departure from past practice is incomprehensible in the face of the lengthy and comprehensive discussion of this issue contained in the final determination:

> *Because this is the first anti-circumvention inquiry in which we have encountered losses of the type and magnitude at issue, we have not had to evaluate the effect of respondents' profit or loss on our analysis in previous inquiries* * * *. [W]e believe that we must consider the causes and the extent of a respondent's losses in reaching conclusions regarding the difference in value in an anti-circumvention inquiry. Otherwise, losses resulting from factors unrelated to the nature of the production process that is the subject of an anti-circumvention inquiry would distort our quantitative analysis by artificially inflating the calculated difference between the value of imported parts or components and the value of a finished product. This would prevent an accurate measure of the extent to which a production process contributes to the difference in value and the extent to which a process represents a change in a respondent's method of production or shipment. In this context, it would be illog-

> ical to assume that Congress intended that the outcome of anti-circumvention inquiries should be determined by factors that are unrelated to the nature of the production process being evaluated. Therefore, it is both necessary and appropriate for us to determine the effect that such factors may have on our difference in value analysis and, when such factors distort our analysis, to use a method that more accurately reflects the nature of the production process that is the subject of the inquiry.

PTFE Final Determination, 58 Fed. Reg. at 26,104 (emphasis added).

The ITA argues that it made specific findings that Ausimont's "Italian facility is an established operation whose level of capacity utilization [is] not affected by the same factors that temporarily affected capacity utilization at [the Texas] facility." *Id.* The ITA also argues that it explained how it determined that the post-treatment costs at Ausimont's Texas facility grossly overstated the value added there by carefully comparing these costs to the costs of Ausimont's "substantially similar" post-treatment operations in Italy. *Id.* at 26,102–04. Wherefore, as the ITA explained,

> In order to reach meaningful conclusions regarding these factors, we must have reliable, objective measures of the value of the imported parts or components and of the value of the finished product that are not distorted by extraneous factors or temporary phenomena. This is especially true in such cases as this. Here, the intermediate product is the sole material input used in the production of the finished product; *thus, any difference between the value of the intermediate product and the value of the finished product will be the result of the processing of the intermediate product into the finished product.*

Id. at 26,105 (emphasis added and citation omitted). Hence, the ITA argues that it is the processing that matters, and, because the processing of the polymer into resin at the Texas and Italian facilities is essentially the same, it was reasonable for it to rely upon the more accurate data from the Italian facility. *Id; Defendant's Memorandum in Opposition,* at 28.

Furthermore, the ITA argues that the statute does not restrict its difference in value determination to a consideration of the costs incurred at a respondent's U.S. facilities. *Defendant's Memorandum in Opposition,* at 33. To the contrary, the statute specifically defines the term "parts or components" contained in the second element of the difference in value calculation with reference to the "parts or components" defined in subparagraph (B)—*i.e.,* "parts or components produced in the foreign country with respect to which such order or finding applies." 19 U.S.C. § 1677j(a)(B). After this language is substituted into subparagraph (C), the difference in value provision requires Commerce to determine that,

> the difference between the value of such merchandise sold in the United States and the value of the imported *parts or components produced in the foreign country with respect to which such order or finding applies is small* * * *

19 U.S.C. § 1677j(a)(C) (language substituted from subparagraph (B) is italicized). Thus, the ITA argues that the statute only requires that it determine the difference in the value of the finished product sold in the United States and the value of the imported parts or components produced in the foreign country subject to the antidumping duty order—and says absolutely nothing about costs of production (or any other specific method of determining differences in value). *Defendant's Memorandum in Opposition,* at 34–35.

The ITA argues that equally without merit is Ausimont's claim that it erroneously introduced qualitative factors into its analysis of the difference in value. The ITA argues that the factors enumerated in 19 U.S.C. § 1677j(a)(2) are categorically different than the factors that it applied in its analysis of "value" pursuant to 19 U.S.C. § 1677j(a)(1)(C) in the present case (as well as in its other anti-circumvention proceedings). The factors actually enumerated in paragraph (2)—*i.e.*, "the pattern of trade;" the relationship between the parties; and whether imports of the precursor parts and components have increased after the issuance of the antidumping duty order—are descriptive of market characteristics, business relationships, and the flow of goods. The ITA argues that these factors provide evidence of circumvention based upon the commercial behavior of the parties and have nothing whatsoever to do with analysis of differences in value. *Id.* at 37–38.

The ITA asserts that the descriptive methodology that it applied to its determination of the value added by the processing operations at Ausimont's Texas facility is based upon an analysis of the process by which finished granular PTFE resin is manufactured. In concluding that the cutting and drying operations at Ausimont's Texas facility constitute only a small portion of this manufacturing process, it (1) developed a thorough understanding of the various steps in the manufacturing process and (2) confirmed its conclusion by comparing the scale and investment required by a facility performing the entire manufacturing process to the scale and investment represented by Ausimont's Texas facility. Plainly, the ITA argues that this is a completely different inquiry than it's investigation into the flow of goods, business relationship, and other market and trade-related factors pursuant to 19 U.S.C. § 1677j(a)(2). *Id,* at 38.

With respect to Ausimont's citation to *Smith Corona Corp., supra,* the ITA argues that this Court did sustain the ITA's determination that it was not appropriate, under the facts of that case, to consider the specific market and trade-related factors enumerated in 19 U.S.C. § 1677j(a)(2) as part of the threshold determination pursuant to 19 U.S.C. § 1677j(a)(1). *Smith Corona Corp.,* 17 CIT at ____, 811 F. Supp. at 694. However, the ITA argues that *Smith Corona Corp.* has nothing to say regarding whether the ITA can determine differences in value pursuant to 19 U.S.C. § 1677j(a)(1)(C) by examining categorically different factors that are indisputably indicative of the value added at Ausimont's U.S. facility. *Defendant's Memorandum in Opposition,* at 38–39 n.22.

The ITA argues that its use of non-quantitative, descriptive evidence to assess difference in value is completely consistent with its past practice. *Id.* at 40; *see PTFE Final Determination,* 58 Fed. Reg. at 26,108–09 (comment 8). In the *Industrial Forklift Trucks From Japan; Negative Final Determination,* 55 Fed. Reg. 6,028 (1990) *("Forklifts Final Determination"),* the ITA supplemented its quantitative analysis of "difference in value" with "qualitative" findings that,

> (1) The respondents performed substantial production operations in the United States; (2) the respondents' U.S. facilities included comprehensive assembly operations; (3) the respondents had begun important manufacturing operations in the United States; (4) the respondents made substantial investments in plant and equipment indicative of the magnitude of their U.S. operations; and (5) the respondents' current U.S. operations, their investment in such operations, and the expanding nature of their operations represent substantial U.S. production operations in the United States.

Forklifts Final Determination, 55 Fed. Reg. at 6,029. Likewise, in the *PETs Preliminary* investigation, as in the present case, the ITA performed a descriptive analysis of the manufacturing process to determine the total value added by Brother's United States production facilities:

> *Nature of Processing* * * * In addition to the purchase of raw material, Brother adds value through assembly, engineering, labor, and quality control. For example, the purchase of a circuit board from a U.S. supplier represents more than the purchase of a plastic board, it also represents Brother's fabrication of the plastic into a component designed to function in a completed PET.
>
> *Our analysis of Brother's manufacturing process is based on Brother's description of its U.S. production processes, and our own observations* * * *. We observed over 100 different steps in the production process: From parts procurement and preparation, to soldering and welding, to adjustment, inspection, and packing.

PETs Preliminary, 56 Fed. Reg. at 46,596 (emphasis added). In *PETs Preliminary,* the ITA concluded that Brother's production workforce and substantial capital investments were further indications of significant production activity in the U.S.

At issue in this case, is whether the ITA acted within its lawful discretion when it departed from it's past practice of calculating the difference in value pursuant to 19 U.S.C. § 1677j(a)(1)(C) and relied on a method of analysis that it determined was better suited to the factual situation in this case.

As noted, under 19 U.S.C. § 1677j(a)(1), the prerequisite for an affirmative circumvention finding is that the difference in value between the imported merchandise and the finished product must be *small.* The legislative history denotes that Congress recognized that the facts of circumvention *vary from case to case* and intended that Commerce employ wide discretion in these situations. *See* Senate Report, *supra.*

The administrative record shows that during the period of the anti-circumvention investigation, Ausimont's Texas facility operated under

anomalous start-up conditions. The Texas facility operated at [ ] capacity utilization rates. In particular, the administrative record shows that the Texas facility operated at [ ]. As a consequence, the Texas facility suffered losses on its granular PTFE resin sales of approximately [ ] during the period of injury. *PTFE Preliminary-Preliminary Difference-in-Value Analysis Memo,* C.R. Document 14, Fi. 25, at Fr. 60–61.

Furthermore, the conditions under which Ausimont's Texas facility operated were very different from the fact patterns of prior anti-circumvention cases. In those cases, the U.S. facilities producing the finished products were all operating at a profit, and the ITA allocated a proportional share of the profit between the imported merchandise and the finished product to obtain a viable comparison of relative value. *See, e.g., Forklifts Preliminary,* 54 Fed. Reg. at 50,262; *PETs Preliminary,* 56 Fed. Reg. at 46,595. By contrast, the [ ] losses suffered by Ausimont's Texas facility presented a problem, which precluded the ITA from relying on its past method of quantitative analysis.

The ITA properly addressed these issues in making its difference in value calculation. As noted above, the ITA computed a difference in value figure of 38–55 percent. This difference in value was computed by using the same method of calculation as used in prior anti-circumvention cases involving U.S. finishing operations. After further evaluation of the administrative record, the ITA determined that producing granular PTFE resin from PTFE wet raw polymer "was relatively simple" and that the 38–55 percent figure is "inconsistent" with all available information on the record. As a result, the ITA re-examined its method of calculation and found that it "was distorted in such a way as to provide an artificially inflated measure of the difference in value between the value of PTFE wet raw polymer and granular PTFE resin." *See PTFE Final Determination,* 58 Fed. Reg. at 26,104. As the ITA explained, "[b]ecause of the distorted relationship between cost and price" at Ausimont's Texas facility, "any estimation of the value of the imported product based on a profit or loss calculated using the actual U.S. manufacturing costs would be unreliable." *Id.* at 26,106.

The ITA undertook further analysis of the facts by attempting to isolate the effect of those losses on its results by performing a calculation in which it did not allocate them to the cost of production of the imported product. The results of this calculation further affirmed that the calculation method used in prior anti-circumvention determinations was inappropriate given the different conditions in this case. The ITA stated that "[b]ased upon the magnitude of the difference between the result of this calculation and the 38–55 percent figure we concluded that respondents' losses had a significant impact on our calculation." *Id.* at 26,104.

Due to the aberrant conditions, the ITA requested additional information from Ausimont concerning its U.S. and Italian production facilities. The ITA reviewed the data and determined that the PTFE

production processes utilized by both Ausimont facilities are "substantially similar" and that a comparison of Ausimont's PTFE finishing costs at its U.S. and Italian operations further demonstrates that the 38–55 percent figure is "distorted." *Id.* Hence, the ITA determined that a quantitative analysis using manufacturing costs at the Italian facility would be meaningful based upon complete information that Ausimont submitted regarding the manufacturing process at Ausimont's Italian, Texas, and former New Jersey facilities. *See, e.g., PTFE Final Determination-Final Difference-In-Value Analysis Memo,* C.R. Document 26, Fi. 28, Frs. 84–86. The ITA stated:

> After comparing respondents' descriptions of their post-treatment processes in Italy and the United States, we determined that the processes used in each plant are sufficiently similar to warrant comparison of the two facilities. *Further, while we recognize that respondents produce products in addition to PTFE resin at their Italian facility, we have focused our analysis only on those portions of respondents' Italian operations related to the production of PTFE resin.* Therefore, we believe that a comparison of respondents' U.S. and Italian facilities is appropriate in this case for purposes of evaluating the nature and operating performance of respondents' U.S. operations.

PTFE Final Determination, 58 Fed. Reg. at 26,107 (emphasis added).

The Court finds that the language in the statute does not restrict the ITA's "difference in value" determination to a consideration of the costs incurred at a respondents' U.S. facilities. Subparagraph (C) of section 1677j(a)(1) requires a determination of whether,

> the difference between the value of such merchandise sold in the United States and the value of the imported parts and components referred to in subparagraph (B) is small * * *.

19 U.S.C. § 1677j(a)(1)(C). The statute only requires that the ITA determine the difference in the *value of the finished product sold in the U.S.* and the *value of the imported parts or components produced in the foreign country* subject to the antidumping order. There is no statutory language which addresses costs of production or specific methods of determining differences in value. In fact, when the ITA calculates the "value of the merchandise sold in the United States," the parties agree that the ITA uses the "ex-factory" U.S. selling price for the finished product, not costs of production. *See PTFE Final Determination,* 58 Fed. Reg. at 20,202–03; *Plaintiffs' Reply Memorandum,* at 25–26; *Defendant's Memorandum In Opposition,* at 33.

In sum, the ITA fully complied with its obligation to offer a reasoned explanation for not relying upon a calculation that reflects the [ ] losses at Ausimont's Texas facility. Since the administrative record reflects that the processing at the Texas and Italian facilities is essentially the same, it was reasonable for the ITA to rely upon the more accurate data from the Italian facility for its difference in value calculation. Under the given conditions, a difference in value cal-

culation based upon the Texas facility's U.S. costs would have frustrated the intent of Congress in enacting the anti-circumvention provision.

With respect to Ausimont's argument that the ITA is prohibited from employing any non-quantitative methods to determine "difference in value" pursuant to 19 U.S.C. § 1677j(a)(1), Ausimont's argument is unpersuasive. The descriptive methodology that the ITA applied to its determination of the value added by the processing operations at Ausimont's Texas facility is based upon an analysis of the process by which finished granular PTFE resin is manufactured. This is a different type of inquiry than that provided for under 19 U.S.C. § 1677j(a)(2). Those factors enumerated under 19 U.S.C. § 1677j(a)(2) provide evidence of circumvention based upon the commercial behavior of the parties and not with the analysis of difference in value.

CONCLUSION

Congress has given the ITA broad discretion in determining difference in value under 19 U.S.C. § 1677j(a). Accordingly, the ITA may employ varying methodologies as long as such methodologies are reasonable and appropriate under the circumstances. In this case, the ITA fully explained its determination to rely upon further processing costs at the Italian facility, as opposed to the processing costs at the U.S. facility. Furthermore, the ITA grounded its explanation in substantial evidence contained in the administrative record. The Court finds that the ITA's affirmative anti-circumvention determination is reasonable and in accordance with law. For the foregoing reasons, the ITA's final affirmative anti-circumvention determination is sustained in all respects.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/28 2/22/95 DiCarlo, J.	Ferrostaal Metals Corp.	93–02–00078	7208.43.0000–4 6%	7225.40.3050–9 3.8%	Agreed statement of facts	Houston Flat-rolled alloy steel, manufactured in Brazil

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